88-1533

Supreme Court, U.S.
FILED
MAR 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

No. 88-

CHARLES RUSSELL TWIST

Petitioner,

v.

EDWIN MEESE, ATTORNEY GENERAL,
U.S. DEPARTMENT OF JUSTICE

Respondent.

Petition For Writ of Certiorari To the United States Court Of Appeals For the District of Columbia Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a federal prosecutor has a duty to inform a federal court that an investigation being conducted by a grand jury, impanelled and supervised by that court, was being obstructed by other Department of Justice attorneys, and whether such a reporting constitutes speech protected by the First Amendment of the United States Constitution.

2. Whether the U.S. Department of Justice can refuse in civil discovery to produce documents or information in the Department's Office of Professional Responsibility simply by alleging that any production is against public policy, without scheduling or listing the items it withholds so that its claims can be evaluated and so that privileged materials, if any, can be severed from non-privileged materials.

3. Whether a federal prosecutor who claims he was fired in retaliation for his reporting the obstruction of a grand jury investigation should have his claim dismissed on summary judgment where the firing was recommended by lawyers he reported, thereby creating issues of intent, motivation and credibility of witnesses. Whether, in such a case, a district court may award summary judgment to the government-defendant, contrary to Rule 56 of the Federal Rules of Civil Procedure, by applying a local district court rule to accept as admitted a statement of facts submitted by the government-defendant moving for summary judgment, thus ignoring issues of material fact in dispute in the record.

PARTIES TO THE PROCEEDING

The parties to the proceedings in the Court of Appeals for the District of Columbia were Edwin Meese, then Attorney General, U.S. Department of Justice and Charles Russell Twist, former Trial Attorney, U.S. Department of Justice, Antitrust Division.

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Petition For Writ of Certiorari To the United States Court Of Appeals For the District of Columbia Circuit

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Petitioner Charles Russell Twist respectfully requests that a writ of certiorari be issued to review a decision of the United States Court of Appeals for the District of Columbia Circuit, entered on August 23, 1988.

OPINIONS BELOW

The opinion (per Garth, J., U.S. Senior Circuit Judge for the Third Circuit[1], and Markey, C.J. and Friedman,

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[1] Sitting by designation pursuant to 28 U.S.C. section 291(a).

J., Circuit Judges for the Federal Circuit,[2] *Twist v. Meese*, No. 87-5371 (D.C. Cir. 1988), and is reprinted in Appendix A to this petition. The decision of the United States District Court, *Twist v. Meese*, No. 86-3220 (D.C. October 19, 1987) is reprinted in Appendix C.

JURISDICTION

The decision of the United States Court of Appeals for the District of Columbia Circuit, of which review is sought, was entered on August 23, 1988. A petition for rehearing, with suggestion for rehearing *en banc*, was filed on October 7, 1988. On December 20, 1988, the petition for rehearing was denied by the panel. Also on December 20,1988, every judge in regular active service on the Court of Appeals for the District of Columbia Circuit recused himself or herself from considering the suggestion for rehearing *en banc*. Because of this, the suggestion for rehearing *en banc* was denied on December. 20, 1988. Appendix B. This Court has jurisdiction to review the judgments of the Court of Appeals under 28 U.S.C. section 1254 (1) (1982).

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

This case involves speech protected by the First Amendment to the United States Constitution, when a federal prosecutor, employed by the U.S. Department of Justice, informed a federal judge and his law clerk that a grand jury being supervised by the court was being obstructed. This speech was required by the *Code Of Professional Responsibility*, including DR 1-102, DR 1-103 (A), and DR7-102 (B) (2), which is mandated for all lawyers employed by the Department pursuant to 28 C.F.R. Part 45, Section 45. 735-1.

This case also involves Local Rule 108 (h) of the Federal District Court for the District of Columbia and

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[2] Sitting by designation pursuant to 28 U.S.C. section 294(d).

Rules 1, 26, 56, and 83 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

In 1982 the *Cleveland Press* newspaper ceased operation, leaving its competitor, *The Plain Dealer*, with a monopoly on the daily newspaper market in the greater Cleveland, Ohio area.[3] In early 1984 Antitrust Division headquarters in Washington authorized a preliminary inquiry into suspicions of antitrust violations. Widmar Dep. 44, 50-51, 53-54. The Petitioner was assigned as a staff attorney to work on the matter. Weedon Dep. 18. In October 1984, a grand jury investigation was authorized by the Antitrust Division. Widmar Dep 87, 89; Weedon Dep. 61-66.

J. Paul McGrath, then Assistant Attorney General for Antitrust, however, advised that, "... if a criminal case were authorized, it would only be authorized against corporate, and not individual defendants." JA 103-104. It was unprecedented within the Division to decide before the first grand jury session that indictments against individuals would not be sought. Widmar Dep. 95-96.

During the following months, numerous unusual and unprecedented incidents in the handling of the grand jury investigation convinced the Petitioner and

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[3] The Brief for Appellant Twist in the Court of Appeals for the D.C. Circuit contains a more detailed discussion of the factual context of the protected speech, along with more extensive citations to the record evidence. It also contains a detailed account of how the *Press/Plain Dealer* grand jury investigation was being obstructed. Part of the obstruction concerned an alleged $30,000 bribe paid by one of the individuals under investigation to the late Jackie Presser, then the leader of the Teamsters Union. A sense of this aspect of the obstruction of the *Press/Plain Dealer* grand jury investigation can be gained from reading in the Joint Appendix (JA) at JA 103-104, JA 130-131, and JA 290-291 and John Weeden's deposition at pages 184-193. Selected parts of the Joint Appendix are reproduced in Appendix G. Further context and background is found in *Advance v. United States* 805 F.2d 155 (6th Cir. 1986).

Ms. Bobula, another staff attorney in the Cleveland Field Office, that some of their supervisors were deliberately impeding the grand jury's progress.

Acting on his responsibility under the *Code of Professional Responsibility*, the Petitioner met with the United States District judge who impanelled the grand jury. He had a later meeting with the judge's law clerk to inquire what his duty and that of Ms. Bobula was in view of their belief that the *Cleveland Press* grand jury investigation was being obstructed. In this connection, the Petitioner shared with the clerk Mr. McGrath's March 25, 1985 memorandum exempting all individuals from prosecution. Twist Dep. 82-85; JA 103-104. The Petitioner also met with the United States Attorney for the Northern District of Ohio, and, once more with the law clerk. Twist Dep. 82, 107-108, 148, 172; McLaughlin Dep. 36.

The Petitioner was ordered to a meeting on June 21, 1985, in Washington, D.C. where he was informed that he was being relieved of his duties on the *Cleveland Press/Plain Dealer* investigation. Twist Dep. 161-162, 183; Rule Dep. 90, 92, 94. Charles F. Rule, the Acting Assistant Attorney General for Antitrust, expressly told the Petitioner that this action was taken in response to his having made disclosures to the Judge and that serious consideration was given to firing him for this action. Twist Dep. 183; Rule Dep 89-91,114; Widmar Dep. 213-214. Mr. Rule also told the Petitioner that he should look for another job. Twist Dep. 185; Widmar Dep.227; Rule Dep. 96.

John Weedon, Chief of the Cleveland Field office, and David Hils, Assistant Chief, two of the attorneys the Petitioner had reported, were advised about what had transpired at the meeting. Hils Dep. 22-23. On September 3, 1985, Mr. Weedon issued an unsatisfactory performance rating for the Petitioner. JA 123-124. The rating was formally concurred in by Joseph H. Widmar, Director of Operations for the

Antitrust Division, who expressly linked the rating to the communications the Petitioner had with the Court. Widmar Dep. 252-254; JA 124. On September 30, 1985, Mr. Weedon recommended in writing that the Petitioner not be promoted to the GS-15 level. JA 125-129. Mr. Weedon premised his recommendation on the reporting that the Petitioner had made to the Court. JA 128.

The Petitioner administratively appealed Mr. Weedon's personnel actions. Appellant's allegations of obstruction of justice, as well as his claim that he was being retaliated against, were taken under investigation by the Justice Department's Office of Professional Responsibility (OPR), which asked that the Antitrust Division postpone consideration of the Petitioner's challenges to his performance evaluation and non-promotion pending completion of the investigation. JA 142. Mr. Ginsberg agreed to defer action on the Petitioner's challenges. Ginsberg Dep. 9-13.

Mr. Weedon then gave the Petitioner a 90-day notice that the Petitioner might be fired for alleged performance deficiencies, relying principally on the fact that the Petitioner had made disclosures to the Court. JA 132, 135-136. On January 8, 1986, Mr. Weedon, with the assistance of Mr. Hils, drafted a recommendation that the Petitioner be fired and again cited the disclosures that the Petitioner had made to the Court. JA 143, 145-146; Hils Dep. 120-121.

As a result of escalating harassment by his superiors in the Cleveland Field Office, the Petitioner on June 23, 1986 filed a grievance to Douglas H. Ginsburg, then Assistant Attorney General for Antitrust. After setting out with specificity the basis for his claim that he was being retaliated against, he asked that he be reassigned away from the supervision of Messrs. Weedon and Hils. JA 189-198. Once he learned that the grievance had been filed, in which both he and Mr. Weedon were named as retaliators, Mr. Hils advised Mr. Weedon. JA

182-186, 190. On June 25, 1986, two days after the Petitioner had submitted his grievance, Mr. Hils recommended to Mr. Ginsburg that the Petitioner be fired. Hils Dep. 183-184; 214; JA 199-206.

The grievance that the Petitioner had filed on June 23, 1986, was held in abeyance pending completion of the OPR investigation. The Petitioner was advised that this was being done because the issues raised in his grievance were closely related to the issues involved in the OPR inquiry. JA 209-210. A similar decision to stay action pending the OPR inquiry was made with respect to the Petitioner's challenge to his denial of with-in-grade pay increase. JA 264.

However, in a memorandum dated August 15, 1986, the Petitioner was abruptly fired, prior to the conclusion of the OPR inquiry, and without resolution of his grievance and administrative appeals.

The Petitioner filed his complaint in the D.C. District Court alleging that his discharge was in violation of his First and Fifth Amendment rights. The district court dismissed the Petitioner's Fifth Amendment claim on April 2, 1987, and on October 19, 1987 granted summary judgment to the Respondent on the First Amendment claim. The district court also denied a pending discovery request by Twist to compel the production of documents and information in the possession of the OPR, On August 23, 1988, the Court of Appeals for the District of Columbia affirmed the decisions of the District Court. A petition for rehearing, with a suggestion for rehearing *en banc*, was filed on October 7, 1988. On December 20, 1988, the petition for rehearing was denied by the panel. Also on December 20,1988, every judge in regular active service on the Court of Appeals for the District of Columbia Circuit recused himself or herself from considering the suggestion for rehearing *en banc*. Because of this, the suggestion for rehearing *en banc* was denied on December. 20, 1988.

REASONS FOR GRANTING THE WRIT

POINT 1.

1. A Federal Prosecutor Has A Duty To Inform A Federal Court That An Investigation Being Conducted By A Grand Jury Impanelled And Supervised By That Court Was Being Obstructed By Other Department Of Justice Attorneys, And Such A Reporting Constitutes Speech Protected By The First Amendment.

This case presents the Court with questions critical to the independence of the federal grand jury system and to the duty of a federal prosecutor to inform the federal court supervising an ongoing grand jury that the grand jury's investigation is being obstructed by other Department of Justice lawyers. Such reporting is necessary by government lawyers to enable the court to exercise its inherent supervisory authority over the grand jury proceedings.

In this case, the Petitioner, then a federal prosecutor in the Antitrust Division of the U.S. Department of Justice became aware that his superiors were engaged in serious and intentional misconduct in the handling of a federal grand jury investigation being conducted by the Antitrust Division in Cleveland, Ohio.

Over a period of many months, the Petitioner and another staff attorney attempted to prevent the grand jury's investigation from being impeded by voicing their objections to their superiors, both orally and through memoranda. The obstruction of the grand jury investigation did not stop and the memoranda were not answered. The Petitioner subsequently informed the federal court supervising the grand jury and the U.S. Attorney for the Northern District of Ohio that the grand jury was being obstructed.

As the Court of Appeals noted in its opinion but passed over, the U.S. Department of Justice contends

that this speech is not protected by the First Amendment.[4]

This position ignores the fact that lawyers are officers of the court and have duties to the court that are independent of their duties to their client. The government has not denied that the Justice Department is a client of its lawyers. The fact that a lawyer is an officer of the court imposes duties on the lawyer that are fundamentally different from those of an employee who is not a lawyer.

Under 28 C.F.R. Part 45, the *Code of Professional Responsibility* (CPR) must be followed by all lawyers in the U.S. Department of Justice. The CPR provides, in part, as follows:

> DR 1-102 Misconduct
>
> (A) A lawyer shall not:
>
> (1) Violate a Disciplinary Rule.
>
> (2) Circumvent a Disciplinary Rule through actions of another.
>
> (3) Engage in illegal conduct involving moral turpitude.
>
> (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.
>
> (5) Engage in conduct that is prejudicial to the administration of justice.
>
> (6) Engage in any other conduct that adversely reflects on his fitness to practice law.
>
> DR 1-103 Disclosure of Information to Authorities
>
> (A) A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall

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[4] Just as the district court did not find it necessary to resolve the issue of whether Twist's speech was protected under the circumstances of this case. [Appendix C-3] (A19), we too find it unnecessary, in light of our disposition of Twist's appeal, to address that issue. We observe, however, that the government has argued as an alternative ground, that Twist's speech was not protected. (Appendix A-9 n.2).

report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

DR 7-102 Representing a Client Within the Bounds of the Law.

(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

The CPR requires a lawyer to inform the court of the misconduct of lawyers, frauds upon the court, and conduct prejudicial to the administration of justice. The Petitioner informed the court of the misconduct of his supervisors involving the handling of a federal grand jury. Because of the secrecy requirements of Rule 6 (e) of the Federal Rules of Criminal Procedure, the Petitioner could report the problem only to the supervising court or lawyers within the Department with authorization to see the grand jury material. No other authority could be consulted.

The logic and importance of informing the supervising court is clear from the decision of the Court last term in *Bank of Nova Scotia v. United States*, No. 87-578, (U.S. June 22, 1988): it is apparent from that decision that prosecutorial misconduct does sometimes occur in the conduct of federal grand juries. One issue presented in this case is whether federal prosecutors have a duty to inform the court of that misconduct

when it occurs. Under the CPR and 28 C.F.R. Part 45, federal prosecutors clearly do have such a duty.

The federal lawyer's responsibility to the court assumes even greater importance when grand jury proceedings are involved. As Justice Marshall observed:

> Because of the strict protection of the secrecy of grand jury proceedings, instances of prosecutor misconduct rarely come to light. This is especially true in the pretrial setting, because defendant's chief source of information about grand jury proceedings is governmental disclosure under the Jencks Act, 18 U.S.C. Section 3500, which do not occur until trial is underway. Marshall, J., dissenting opinion at 1.

The *ex parte* nature of grand jury proceedings and the secrecy with which they are conducted make the reporting requirements of the CPR particularly important. Federal courts must be informed of prosecutorial misconduct, if they are to assure the proper functioning of grand juries under their supervision. Without this reporting requirement, there is significantly less chance that the supervising courts will ever become aware of the misconduct.

Consequently, the Petitioner had a duty to inform the court of prosecutorial misconduct that otherwise would not have come to light. The Petitioner was not in the position of a mere employee, but rather was acting as an officer of the court. The Petitioner's disclosures to the federal court were not only an appropriate exercise of his duties as a federal prosecutor; they also constituted protected speech under the First Amendment to the Constitution.

In deciding whether a government employee's speech is entitled to protection under the First Amendment, it must first be determined whether the questioned speech implicates the public interest.

Pickering v. Board of Education, 391 U.S. 563, at 574 (1968).[5] If so, a balancing test must be applied between the employee's interests, as a citizen, in commenting on matters of public concern and the interest of the government, as an employer, in promoting the efficiency of the public services it performs though its employees. *Pickering v. Board of Education*, 391 U.S. at 567; *Connick v. Meyers*, 461 U.S. 137, at 142 (1983).

In *Connick v. Meyers*, 461 U.S. 137, 146-147 (1983), the Court explained the process by which a court determines whether an employee's speech addresses a matter of public concern:

> Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record.

The Court held that Meyers speech did not implicate the public interest because:

> Meyers did not seek to inform the public that the District Attorney's Office was not discharging its governmental responsibilities in the investigation and prosecution of criminal cases. Nor did Meyers seek to bring to light actual or potential wrongdoing or breach of public trust on the part of Connick and others. At 148.

The situation in *Connick v. Meyers* was directly the opposite from the case at bar. Unlike Meyers, the Petitioner's speech did seek to disclose that federal prosecutors were not discharging their governmental responsibilities in the investigation and prosecution of criminal cases and the Petitioner's speech did seek to bring to light actual and potential wrongdoing and

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[5] Speech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection. *NAACP v. Clairborne Hardware Co.*, 458 U.S. 886, 913 (1982).

breaches of public trust on the part of supervisors he reported. Therefore, the Petitioner's speech meets the public interest test for First Amendment protection under *Connick v. Meyers*.

In fact, speech which discloses any evidence of corruption, impropriety, or other malfeasance on the part of government officials, in terms of content, of necessity concerns matters of public import. *Conaway v. Smith*, 853 F.2d 789, 796 (10th Cir. 1988); *Southside Pub. Schools v. Hill*, 827 F.2d 270 (8th Cir.1987); *Daniels v. Quinn*, 807 F.2d 687, 690 (4th Cir. 1986); *Cox v. Dardanelle Pub. School Dist.* 790 F.2d 668, 672 (8th Cir. 1986); *Mahronic v. Walker*, 800 F.2d 613 (6th Cir. 1986); *Knapp v. Whitaker*, 757 F.2d 827, 840 (7th Cir.) *cert. denied*, 474 U.S. 803 (1985); *Brasslett v. Cota*, 761 F.2d 827 (1st Cir. 1985); *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir.1983); *Czurlanis v. Albanese*, 721 F.2d 98 (3rd Cir. 1983); *Key v. Rutherford*, 645 F.2d 880 (10th Cir. 1981).

When balancing the rights of the employee against those of the employer, an employee's First Amendment interest is entitled to greater weight where he is acting as a whistle blower in exposing government corruption. *Conaway v. Smith*, 853 F.2d 789, 797 (10th Cir. 1988); *Foster v. Ripley*, 645 F.2d 1142, 1149 (D.C. Cir. 1981). The Petitioner acted as a whistle blower to expose government corruption, and therefore, his First Amendment interests are entitled to greater weight.

The lower courts herein failed to apply the tests set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Meyers*, 461 U.S. 138 (1983), when evaluating the Petitioner's reporting to the court. The first issue the lower courts should have addressed was whether The Petitioner's speech implicated the public interest. Both the district court and the court of appeals expressly stated that they did not consider this issue at all. Appendix C-3; Appendix A-9

Had they done so, as shown by the cases cited above, they should have concluded that the Petitioner's disclosures were clearly matters of public interest, deserving of the highest level of protection. The lower courts should then have conducted a balancing test between the Petitioner's First Amendment rights in the speech at issue and the government's interest, as an employer, in promoting the efficient operation of its public services. Neither the district court nor the court of appeals conducted such a balancing test.

Instead, the lower courts began their analysis at the trial stage and attempted to evaluate whether the Petitioner's speech constituted a motivating factor in his firing. This issue should not have been addressed before a scrutiny of the Petitioner's First Amendment rights against the government- employer's interest. *Connick v. Meyers*, 461 U.S. 137, 146 1983).

It is apparent from the case at bar that a determination on this third issue–whether the Petitioner's speech constituted a motivating factor in his firing–cannot be accurately made before considering the first two issues. This third issue, like the issue of whether an employee's speech addresses a matter of public concern, must be determined by the content, form, and context of a given statement, as revealed by the whole record. By never analyzing the nature and context of the Petitioner's speech (as required under the first prong of the test), the lower courts also failed to examine the firing in context and were unable to properly judge whether the protected speech was a motivating factor.

In fact, not only did the lower courts fail to analyze the firing in the context of the protected speech and what the Petitioner was reporting, they severed the speech from their review of the firing by observing that the actual firing of the Petitioner occurred approximately a year after the speech. This superficial analysis ignored considerable evidence in the record

that showed that the process of firing the Petitioner began with the June 21, 1985 Washington meeting and the unsatisfactory performance rating given shortly after his reporting to the court. Numerous adverse personnel actions that were based on the reporting continued to occur during that one year time period and clearly connected the firing with the reporting *See* Brief of Appellant in the Court of Appeals for the D.C. Circuit, at pages 37 through 40.

Finally, the lower courts herein failed to ever consider the fourth issue, whether the government had shown by a preponderance of the evidence that it would have fired the Petitioner even in the absence of the protected speech. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 273, 287 (1977). In making this determination, the courts should have also scrutinized the sufficiency of the alleged grounds for the firing, because the government's burden in justifying a particular discharge will vary depending upon the nature of the employee's expression. *Connick v. Meyers*, 461 U.S. 137, 150 1983)

Because the Petitioner's speech – reporting the obstruction of a grand jury investigation by government officials – is entitled to the highest level of First Amendment protection, only a substantial government interest can outweigh its exercise. The lower courts held that the Petitioner was fired for the reasons set forth in the firing recommendations in the two letters prepared by Mr. Hils. JA 199-206, 207-208. A review of the Hils letters reveals that, had the lower courts performed a particularized balancing test between the Petitioner's First Amendment speech and the purported reasons the government offered for the firing, the grounds alleged in the Hils letters are clearly insufficient to justify overriding the interests of the Petitioner, the public, and the courts.

Therefore, the Petitioner respectfully requests that the Petition for a Writ of Certiorari be granted.

Pennekamp v. Florida, 328 U.S. 331, 335 (1986); *Jacobellis v. Ohio*, 378 U.S. 184, 190 (1964).

POINT 2

2. The U.S. Department Of Justice Cannot Refuse In Civil Discovery To Produce Documents Or Information In The Department's Office Of Professional Responsibility Simply By Alleging That Any Production Is Against Public Policy, Without Scheduling Or Listing The Items It Withholds, So That It's Claims Can be Evaluated, And So That Privileged Materials, if Any, Can Be Severed From Non-Privileged

No index or description of any kind of the documents withheld from production, other than acknowledgment of a final report by OPR, was ever provided by the government to the Petitioner or the Courts. In response to a motion to compel the final report and underlying documents of the Office of Professional Responsibility of the U.S. Department of Justice (OPR) of the investigation into the charges made by the Petitioner and Ms. Bobula that the *Press/Plain Dealer* grand jury was being obstructed,, the government simply filed affidavits saying, in effect, that it was against public policy to produce the documents. No statutory authority for this refusal was cited; none exists. Therefore, Rule 26 of the Federal Rules of Civil Procedure governs the production of the OPR materials. In *Laxalt v. McLatchy*, 809 F.2d 885. 889 (D.C. Cir. 1987) the court stated:

> Once again, we indicate that, absent an express congressional intent to the contrary, the standards set forth in the FRCP must be followed with respect to discovery requests in District Court...As we have noted in the past, such traditional devices as protective orders and in camera inspection offer reliable means with

> which to give effect to liberal discovery principles.

The panel's decision to affirm the District Court's denial of the Petitioner's motion to compel discovery of the OPR report and the underlying OPR file, without first requiring the government to schedule the withheld documents, is directly contrary to the established case law, in this Court, the Court of Appeals for the District of Columbia Circuit and the Third Circuit.

This approach runs directly contrary to the holding of this Court in *EPA v. Mink*, 410 U.S. 73, 91 (1973). It is highly probable that the OPR report and the underlying files contain considerable factual information. In fact, this representation was made by counsel for the government to the district court:

> There is a report about fourteen pages long which contains the conclusions and summarizes the facts. JA 52.

The government has not followed the instruction given in *EPA v. Mink*, 410 U.S. 73, 91 (1973) and has not severed the facts the government admits are contained in the report.

The District of Columbia Circuit has previously considered cases where the government has resisted disclosure of internal reports and documents and files underlying those reports. In all of those cases, the Circuit properly placed the initial burden on the government to justify non-disclosure, not on the movant to show need or relevance. *see*, e.g., *Playboy Enterprises, Inc, v. U.S. Department of Justice*, 516 F. Supp. 233 (D.D.C. 1981), *aff'd* with modifications, 677 F.2d 931 (D.C. Cir. 1982); *Lesar v. U.S. Department of Justice*, 455 F. Supp. 921 (D.D.C. 1978) *aff'd*. 636 F.2d 472 (D.C. Cir. 1980).

The decision of the Circuit herein contradicts the previous law of the Circuit by not requiring the government, in even a minimal way, to meet its

threshold burden in making a claim of privilege. Instead of requiring the government to justify its non-disclosure of the materials sought in discovery, the panel's decision improperly shifted the initial burden to the Petitioner to demonstrate relevance. Until the panel's decision herein, the law of the Circuit had been to require the non-disclosing party to substantiate and detail a claim of privilege, rather than to rely on mere conclusory allegations of a generalized privilege to cover the withholding of an entire investigative file and report.

The panel's decision to place the initial burden on the Petitioner to show the relevancy of the OPR report also stands directly contrary to the case law in the Third Circuit in a substantially similar case. In *Higgins v. Kelly*, 574 F.2d 789 (3rd Cir. 1978) the circuit court reversed the district court's ruling that materials sought in discovery were irrelevant, stating:

> Without seeing the documents plaintiff requested, there is little basis upon which to form a conclusion that there are no genuine issues of fact. 574 F.2d at 793

The Third Circuit also rejected the government's position that the plaintiff should first be required to show relevance. Without discovery, the Circuit stated it would be impossible to determine the reason for the firing of *Higgins*, the plaintiff therein. 574 F. 2d at 793.

> To require the plaintiff to demonstrate the relevancy of documents he has never seen, and the contents of which are largely unknown, creates an insurmountable burden for the plaintiff. 574 F.2d at 793

Under the law of the District of Columbia Circuit, the panel should have required the government to itemize and index the withheld documents in such a manner as to correlate justification for refusal to

disclose with actual portions of documents claimed to by privileged. *Vaughn v. Rosen*, 484 F. 2d 820 (D.C. Cir. 1973). The Circuit held in *Vaughn*, that the itemization must be done with "specificity, separation, and indexing." 484 F. 2d 827.

No such index or description of any kind of the withheld documents were ever provided by the government. Obviously, decisions on relevancy cannot be accurately made when the contents of the documents being judged is unknown. As the Circuit had held previously, it is only on the basis of "detailed affidavits and indices" of the specific documents that comprise the file sought that a claim of privilege can be evaluated and privileged material separated from non-privileged. *Lesar v. U.S. Department of Justice*, 455 F. Supp. 921, 923 (D.D.C. 1978), *aff'd.*, 636 F.2d 472 (D.C. Cir. 1980).

After *Playboy Enterprises, Inc. v. U.S. Department Of Justice, supra*, 516 F. Supp. 233, it had been the law that a claim of privilege could not be utilized to withhold the OPR report and underlying files in their entirety. Purely factual material appearing in documents in a form that is severable without compromising the private remainder of the documents was not protected by the privilege. *Playboy*, 677 F. 2d at 935, quoting *EPA v. Mink*, 410 U.S. 73, 91 (1973).

Moreover, the government clearly waived any privilege that may have existed by its circulation of the OPR report to officials in the Antitrust Division and by its continuous disclosure of information in the form of "periodic status reports" to Douglas H. Ginsburg, then Assistant Attorney General for Antitrust, and to the counselor to the Attorney General, Bradford Reynolds, during the pendency of the OPR investigation. *See*, JA 303, paragraph 5; Widmar Dep. 265-270. Voluntary disclosure of a significant part of a privileged communication has been held to waive the privilege. *Peck v. United States*, 514 F. Supp. 210 (S.D. N.Y. 1981).

Obviously, the OPR report, containing its findings and conclusions, forms the most significant part of the withheld documents. Worse, the panel's decision has produced the anomalous and inequitable result that the OPR report and underlying information in the form of "status reports" were provided to some of the subjects of the OPR inquiry, but not to the Petitioner, who was the original complainant. Such a result is also contrary to the spirit of the mandate of the Code of Federal Regulations which governs the operation of the OPR. *See* 28 C.F.R. 0.39.

These continuous disclosures by OPR to the Antitrust Division also create a genuine issue of material fact as to whether Antitrust Division officials did indeed consider matters before OPR in the decision to fire the Petitioner. The Deputy Assistant Attorney General, Douglas H. Ginsburg, expressly admitted in at least one memorandum that, "I intend to consider OPR's finding before making a decision" on the Petitioner's grievance concerning Mr. Hils. JA 209.

Additional Antitrust Division memoranda in the record document the relevance of the OPR materials. These memoranda expressly state that the Petitioner's various administrative appeals (of his performance evaluation, of the denial of his promotion, of the denial of his within-grade pay increase), as well as his grievance, would be held in abeyance by the Department pending completion of the OPR report, precisely because the same issues were raised in his appeals and grievance as those issues that were investigated by OPR. JA 142, 209-210, 264.

Although under the law of this court, the District of Columbia Circuit, and the Third Circuit, the initial burden should have been on the Respondent to show the relevance of documents the Petitioner had not seen, the contents of which were never indexed or described. The record, nevertheless, provides compelling evidence of the relevance of the entire OPR

inquiry. It is also important to note, that the Petitioner did not have "ample opportunity, while conducting his discovery inquiries to develop" a more detailed record to prove relevancy, though, as shown above, a more than sufficient showing has been made. The record is replete with examples in the depositions of how the government consistently refused to respond to any inquiries concerning the OPR investigation. *See e.g.* Widmar Dep. 316-317. The Petitioner's motion for discovery was intended to produce precisely the type of evidence the panel herein claims was lacking. Prior to any determination on the motion for summary judgment the Petitioner's discovery motion should have been granted.

The Petitioner made allegations of criminal misconduct by lawyers in the U.S. Department of Justice to a federal court. Subsequently, the OPR began to investigate these matters and allegations that the Petitioner was being retaliated against for reporting the misconduct. The Petitioner was fired before the investigation was completed. Although the Antitrust Division alleges that the OPR report vindicates the reported supervisors, there is no admissible evidence to corroborate this allegation, because the OPR has refused to produce the report or any information developed from its investigation. Therefore, the decision of the Court of Appeals denying discovery of the OPR materials should be reversed.[6]

POINT 3

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[6] The district court denied the Petitioner's discovery request without making any in camera review of the withheld documents. The court stated:

> And I've got a non-jury matter in front of me so I can't do what I normally do, which would be to ask for the [OPR] report, take a look at the report, draw some conclusions from looking at the report as to whether or not there was anything in there that might be useful, you see. But I can't– I don't think I should do that when I'm the finder of facts. Appendix A-17.

3. A Federal Prosecutor Who Claims He Was Fired in Retaliation for His Reporting the Obstruction of a Grand Jury Investigation Should Not Have His Claim Dismissed On Summary Judgment Where The Firing Was Recommended By Lawyers He Reported, Thereby Creating Issues Of Intent, Motivation and Credibility of Witnesses. In Such A Case, A District Court May Not Award Summary Judgment To The Government-Defendant, Contrary to Rule 56 Of The Federal Rules Of Civil Procedure, By Applying A Local District Court Rule To Accept As Admitted A Statement of Facts Submitted By The Government-Defendant Moving For Summary Judgment, Thus Ignoring Issues Of Material Fact In Dispute In The Record.

A panel is not authorized to change the law in a circuit unless instructed to do so. *United States v. Albert*, 675 F.2d 712 (5th Cir. 1982). However, the panel in the case at bar made a fundamental change in the law of the District of Columbia Circuit without being instructed to do so. The magnitude and importance of this change in circuit law is immediately clear after a reading and contrasting of *Twist v.Meese*, No. 87-5371 (D.C. Cir. August 23, 1988) and the Circuit decision it overturned: *Mazaleski v. Treusdell*, 562 F.2d 701 (D.C.Cir. 1977).

In *Mazaleski v. Treusdell* 562 F.2d 701 (D.C. Cir. 1977) the court based its holding on the decision of the Supreme Court in *Poller v. Columbia Broadcasting System, Inc.*, 365 U.S. 464 (1961). In *Poller v. Columbia Broadcasting System, Inc.* the Supreme Court gave instruction where motive and intent play leading roles, the proof is largely in the hands of alleged conspirators, and there are hostile witnesses. This is precisely the situation in the case at bar and probably most cases where the issue is whether there has been a retaliatory firing.

The Court stated:

> We believe that summary procedures should be used sparingly...where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice". 365 U.S. 464

In *Mazaleski v. Treusdell* 562 F.2d 701 (D.C. Cir. 1977), as in the case at bar, the petitioner was not fired until more than a year after his protected conduct. The district court had determined that his claim was, "without merit since there is no indication whatsoever in the record ... plaintiff's statements in this regard were even considered by defendants at the various stages of review in the process of termination."

On appeal, however, the *Mazaleski v. Treusdell* court stated, "[we] think it clear that the Court's disposition in substance, amounted to an anticipatory consideration of merits of appellant's proof that his protected activities were a 'motivating' factor in the Services's decision to terminate his commission, or even the Service's proof that it would have reached the same result in the absence of appellant's criticisms..." 562 F.2d 701, 718.

The panel in the case at bar refused to follow the direction provided by *Poller v. Columbia Broadcasting System, Inc* , 386 U.S. 464 (1962) and *Mazaleski v. Treusdell*, 562 F.2d 701 (D.C. Cir. 1977) even though the Petitioner had a substantially stronger case than did Treusdell. Instead, the panel concluded that the Petitioner failed to present enough evidence to avoid summary judgment under *Catrett v. Johns-Manville Sales Corp.*, 826 F.f2d 33, 39 (D.C. Cir. 1987), *cert denied*, ___U.S.___, 108 S.Ct. 1028 (1988).

These two fundamentally different approaches are in total conflict. Accordingly, there are now two conflicting approaches on how to make a determination in the District of Columbia Circuit regarding whether protected speech was a substantial or motivating factor in the termination.

The Petitioner had reported Mr. Hils for obstructing the *Press/Plain Dealer* grand jury. JA 221. There is a clear conflict of interest for Mr. Hils to recommend that the Petitioner be fired before OPR concluded its investigation of the charges. This conflict of interest makes summary judgment inappropriate because it places Mr. Hil's motivation and credibility in question. This is particularly so when there is a direct conflict in the testimony of Mr. Hils and Mr. Widmar regarding a conversation they had about the firing recommendation. Hils Dep. 192,196; Widmar Dep. 327-329.

The motivation of the government is also placed in question by the clear conflict in testimony of Patrick McLaughlin, the U.S. Attorney in the Northern District of Ohio, and three Department officials regarding their conversations about The Petitioner's reporting the obstruction of the grand jury to the court and to the United States Attorney. McGlaughlin Dep. 50-51,86,89; Weeden Dep. 146-148; Leddy Dep. 66-74; Widmar Dep. 177-187, 205, 215.

This serious conflict in testimony of the United States Attorney and other Department officials was pointed out to the district court during the Petitioner's effort to compel production of the OPR report and underlying file. The court did not have to search for it.

A suggestion for rehearing *en banc* was made to the circuit court on October 7, 1988 to review the serious conflict between the approaches established by *Mazaleski v. Treusdell*, 562 F.2d 701 (D.C.Cir. 1977), and *Twist v. Meese*, No. 87-5371 (D.C. Cir. August 23, 1988). Every active judge on the Court of Appeals for the

District of Columbia Circuit recused himself or herself from considering the suggestion for rehearing *en banc* and the suggestion was therefore denied

This total recusal shows that this is not a situation where conflicting panel decisions may be viewed by the Court as merely an intramural fight that can be resolved by a rehearing *en banc* if it suits the will of a majority of the active judges on the circuit. To the contrary, the serious conflict between the panel decisions together with the recusal of every active judge on the Court of Appeals for the D.C. Circuit establishes an additional and compelling reason why the Court should grant this petition for certiorari.

Local Rule 108 (h) of the District Court of the District of Columbia, as applied by the lower courts, is inconsistent with Rule 56 of the Federal Rules of Civil Procedure. This is prohibited by Rule 83 of the Federal Rules of Civil Procedure. It is also contrary to the spirit of Rule 1 of the Federal Rules of Civil Procedure, which is the touchstone of interpretation of all of the Federal Rules of Civil Procedure.

Moreover, the circuit decision is directly contrary to the decision of the Fifth Circuit in *John v. Louisiana (Board of Trustees For State Colleges and Universities)*, 757 F.2d 698 (5th Cir. 1985). It is also contrary to the decision of the Eleventh Circuit in *Dixie Stevedores, Inc., v. Marinic Maritime, Ltd.*, 778 F.2d 670 (11th Cir. 1985).

In *John v. State of Louisiana (Board of Trustees For State Colleges and Universities)*, 757 F.2d 698 (5th Cir. 1985) the court held that a motion for summary judgment cannot be granted simply because there is no opposition, even if the failure to oppose violated a local rule. *See also Hibernia National Bank v. Administracion Central Sociedad Anonima*, 776 F.2d 1277 (1985).

In *Dixie Stevedores, Inc., v. Marinic Maritime, Ltd.*, 778 F.2d 670, 673 (11th Cir. 1985), the Eleventh Circuit cited *John v. State of Louisiana (Board of Trustees For State*

colleges and Universities), 757 F.2d 698, 673 (5th Cir. 1985) and agreed with its holding:

> We begin our analysis with *John v. State of Louisiana*, 757 F.2d 698 (5th Cir. 1985). In *John*, the Fifth Circuit Court of Appeals reversed the lower court's grant of summary judgment holding that a local rule could not authorize summary judgment on a record that would not otherwise support it. Summary judgment, the Fifth Circuit stated, is not appropriate simply because the non-moving party fails to respond to the motion. Summary judgment is only appropriate where the moving party carries the burden of demonstrating an absence of material questions of fact. Under rule 56, violation of a local rule does not result in a summary judgment based upon the failure of the non-moving party to respond.. The Fifth Circuit has also held in *Environmental Defense Fund v. Marsh*, 651 F.2d 983 (5th Cir. 1981), that a non-moving party is not required to respond to a motion for summary judgment until the moving party has supported the motion with sufficient proof. We agree with the reasoning of the Fifth Circuit.

There is a clear conflict between the law of the Fifth Circuit and the Eleventh Circuit on the one hand, and the law of the District of Columbia Circuit on the other. Resolution of this conflict by the Supreme Court is timely because there is conflict among the three circuits that have considered the issue, particularly when summary judgment is such a drastic action.

Rule 56 imposes on the district court when considering motions for summary judgment the "statutory task of determining whether the pleadings, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact... Fed. R. Civ. P.

56." *Stephenischen v. Merchants Dispatch Transportation Corporation*, 722 F.2d 922, 930 (1st Cir. 1983).

As the circuit court recognized, the record includes depositions of nine individuals, multiple affidavits, numerous interrogatories and other discovery requests. Rule 56 requires that this record contain no issue of material fact for summary judgment to be granted. The district court expressly made no review of this evidence. Indeed, the court stated that "I don't even know whether the depositions are filed." JA 70.

Moreover, the burden is on the moving party to show that this record contains no issue of material fact in dispute. As explained below, the government did not make that showing.

Whatever may be the correctness of Local Rule 108 (h) in the abstract, it is totally inconsistent with Rule 56 as it was applied by the district court and the panel. Such an application is specifically prohibited by Rule 83 of the Federal Rules of Civil Procedure. Finally, it tramples on the spirit of Rule 1.

Significantly, the district court did not verify whether the government had supported its statement of undisputed facts by the record. Obviously, the court did not review the evidence cited by the government to determine if its citations supported its claims.

If the court had made a cursory attempt to check the accuracy of the government's citations, it would have discovered that points raised by the government are not supported by the portions of the record cited. The record establishes numerous material facts in dispute.

Instead, the district court accepted as admitted the points raised by the government, because the Petitioner's lawyers were not timely in following the local rule. Thus the court failed to make an independent review of the evidence to determine whether it supported summary judgment disposition. Such an independent review by the court is required. *McKinney v. Dole*, 765 F.2d 1129, n. 12 (D.C. Cir. 1985).

The record is replete with disputed issues of material fact. For example, it is contemplated under Rule 56 of the Federal Rules of Civil Procedure for the court to be obliged to review the transcript of the Supervisory Meeting between the Petitioner and Assistant Attorney General Douglas H. Ginsburg since Mr. Ginsburg questioned the Petitioner about the allegations made by Mr. Hils in his two letters recommending that the Petitioner be fired. JA 199-206, 207-208. This transcript shows that there are significant material facts in dispute. For example, the panel has said that the Petitioner never denied that he refused to work on the concrete pipe investigation. But this record transcript shows that the Petitioner did deny that he refused to work on the concrete pipe investigation:

> Mr. TWIST: One final one. It'll just take a minute. I never refused to work on the concrete matter. I attended the meeting, and in fact, on July 1, Mister - -
>
> ASSISTANT ATTORNEY GENERAL GINSBURG: That's just not a subject of my concern.
>
> MR. TWIST: But I never refused.
>
> ASSISTANT ATTORNEY GENERAL GINSBURG: Thank you for coming here. Do you expect you will have to go to the office to remove things? JA 262-263.

The record also shows that the Petitioner denied ever being disrespectful to Mr. Hils or Mr. Weedon. JA 254. These facts are material because the government alleges that these are reasons for which the Petitioner was fired. The Petitioner asserted that these allegations are false and are really pretextual reasons for the Petitioner's retaliatory firing. JA 267-289. Thus, the record does show issues of material fact in dispute. These are two serious examples. There are others. The government had the burden to prove there were no

material issues of fact in dispute in the record. Surely the district court should be expected to read at least the very portions of the record relied upon by the government as support for the firing before simply accepting the government's statement of facts as admitted.

The record also shows that what the government refers to as "a threat" by the Petitioner is actually the Petitioner's telling Mr. Hils that if the harassment against him continued he would file a law suit. JA 107. This speech clearly does not amount to a threat and, moreover, is speech protected by the First Amendment. Every citizen has the right to petition the government for redress of grievances and a law suit is just such a petition to the government. *Cruz v. Bets*, 405 U.S. 319, 321. Therefore, it cannot be unlawful, or grounds to fire someone, for an individual to say that he is going to do what the Constitution specifically permits. *See Gifford v. Atchison, Topeka and Santa Fe Railway Company*, 685 F.2d 1149, (9th Cir. 1982) 1156 n.3.

Moreover, the Second Circuit has held that just such a statement is protected by the First Amendment. *Janusaitis v. Middlebury Volunteer Fire, etc.*, 607 F.2d 17, 25 (2nd Cir. 1979). The panel's decision is thus contrary to the holding of *Cruz v. Bets*, 405 U.S. 319 and conflicts with the Second Circuit decision in *Janusaitis v. Middlebury Fire, etc.*, 607 F.2d 17 (2nd Cir. 1979).

For the reasons stated above, the Petitioner respectfully requests this Court to grant the Petition for a Writ of Certiorari.

CONCLUSION

The issues presented in this case give the Court the opportunity to instruct federal prosecutors on their duty to communicate with a court supervising a grand jury when other Justice Department lawyers are engaged in misconduct affecting the grand jury. The case also provides the opportunity to review whether

such communication is protected by the First Amendment to the Constitution of the United States. These issues are fundamental to the operation of the U. S. Department of Justice; their resolution would clarify the professional responsibility of federal prosecutors conducting grand juries throughout the United States.

In addition, the case gives the Court the opportunity to determine whether the U.S. Department of Justice can refuse to produce documents or information in the Department's Office of Professional Responsibility, without scheduling or listing the items it withholds, simply by alleging that such production is against public policy.

Finally, the case presents the issue of whether a district court may award summary judgment, contrary to Rule 56 of the Federal Rules of Civil Procedure, by applying a local district court rule to accept as admitted a statement of facts while ignoring issues of material fact in dispute in the record.

For the reasons stated above, the Petitioner respectfully requests that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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counsel of record

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing PETITION FOR WRIT OF CERTIORARI were forwarded by first-class mail, postage prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530, this 20th day of March, 1989.

Charles Russell Twist
Counsel of Record

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued May 16, 1988 Decided August 23, 1988

No. 87-5371

CHARLES RUSSELL TWIST, APPELLANT

v.

EDWIN MEESE, ATTORNEY GENERAL,
U.S. DEPARTMENT OF JUSTICE, APPELLEE

On Appeal from the United States District Court
for the District of Columbia

Joseph B. Scott, with whom *Irving Kator* and *David H. Shapiro* were on the brief, for appellant.

Jeffrey S. Paulsen, with whom *John R. Bolton*, Assistant Attorney General, *Jay B. Stephens*, United States Attorney, *Brook Hedge*, *Mary E. Gotten*, and *Robin Ball* were on the brief, for appellee. *Michael Jay Singer* also filed an appearance on behalf of the appellee.

Before HOWARD T. MARKEY,* *Chief Judge*, and DANIEL M. FRIEDMAN,* *Circuit Judges* for the Federal Circuit and

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* Sitting by designation pursuant to 28 U.S.C. section 291(a).

LEONARD I. GARTH,** *U.S. Senior Circuit Judge* for the Third Circuit.

Opinion for the court filed by *Senior Circuit Judge* GARTH.

GARTH, *Circuit Judge*: Plaintiff/appellant Charles Russell Twist commenced this action against defendant/ appellee Edwin Meese, Attorney General of the United States, alleging that his discharge by the Department of Justice was in violation of his first and fifth amendment rights. The district court dismissed Twist's fifth amendment claim on April 2, 1987, 661 F. Supp. 231, 233-34 (D.D.C.1987), and on October 19, 1987 granted summary judgment to the Attorney General ("government") on Twist's first amendment claim. We affirm.

I.

Twist was hired as an attorney for the Justice Department's antitrust Division in 1979. In June 1984, he was reassigned from Washington. D.C., to the Field Office in Cleveland, Ohio. Upon arriving in Cleveland, Twist was assigned to an antitrust investigation involving the *Cleveland Press* newspaper. Twist was a staff attorney on this investigation.

Soon after his assignment to the *Cleveland Press* case, Twist expressed his disagreement with the manner in which the Justice Department was conducting the investigation. Eventually, Twist accused several members of the Justice Department with obstructing justice.

Twist, together with another attorney assigned to the investigation, wrote several memoranda to his superiors suggesting that certain grants of immunity would be improper. Twist also spoke to the District Court Judge who would review any immunity requests

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** Sitting by designation pursuant to 28 U.S.C. section 294 (d).

made by the government in the *Cleveland Press* investigation. Additionally, Twist initiated two meetings with the law clerk of the district court judge and shared with the law clerk his view that certain immunity requests, then under consideration by the government, were improper. When questioned by his superiors about these incidents, Twist initially denied they had occurred, but later admitted to them.

As a result of these incidents, in June 1985, Twist was removed from the *Cleveland Press* investigation and reassigned to other duties. He also received an "unsatisfactory" job performance evaluation and was refused a promotion. Twist appealed both of these decisions alleging that they were in retaliation for his claims that the Department was obstructing justice. Twist's claims of retaliation were referred to the Justice Department's Office of Professional Responsibility ("OPR"). After an investigation, the OPR concluded that the actions taken by the government in the *Cleveland Press* investigation were appropriate exercises of prosecutorial discretion, and did not constitute an obstruction of justice. (A300).

Because his performance had been rated deficient, Twist was informed by the Chief of the Cleveland office, John Weedon, that he would be given 90 days to improve his performance or would face discharge. Twist was also ordered to meet with Weedon every Friday for the purposes of discussing his work. At these weekly meetings, Twist was required to produce whatever written material he had produced that week.

At first, Twist complied with these requirements. However, on June 20, 1986, when David Hils, as Acting Chief of the office in the absence of Weedon, attempted to conduct one of the weekly meetings, Twist refused to cooperate. Hils subsequently recommended to the Assistant Attorney General in charge of the antitrust division, Douglas H. Ginsburg (now a United States Circuit Judge of the United States

Court of Appeals for the District of Columbia), that Twist be discharged.

Hils documented Twist's conduct in two letters to Ginsburg. In his first letter, dated June 25, 1986, Hils described Twist's refusal to accept an assignment to a pending antitrust investigation involving concrete pipe. Hils wrote that Twist "emphatically said, 'I won't do it.'" (A201). The letter also described a discussion between Weedon, Hils and Twist, concerning Twist's assignment to the concrete pipe investigation. The l letter stated that during this discussion, Twist strongly criticized Weedon's refusal to assign him to a different investigation. In that same letter, Hils recited that Twist had accused him, Hils, of lying concerning an unrelated matter. Hils also wrote that Twist, upon commencement of the meeting, stated that he considered the meeting to be part of a cover-up of a crime, and that Twist had accused Hils of being a co-conspirator and of harassing him. On July 8, 1986, Hils again wrote to Ginsburg and once again requested Twist's discharge.

Upon receiving these letters, Ginsburg called Twist and Hils to Washington for an on-the-record hearing at which Twist could respond to Hils' charges against him and submit written statement. After reviewing Twist's statement, Ginsburg recommended to the Deputy Attorney General that Twist be discharged. Twist was terminated on August 15, 1986, for "insubordinate and disrespectful conduct toward his supervisor." (A318).

Twist thereupon filed a non-jury action against the Attorney General in the United States District Court for the District of Columbia, alleging violations of his fifth and first amendment rights. on April 2, 1987, the district court dismissed Twist's fifth amendment claim. On September 1, 1987, the Attorney General moved for summary judgment on Twist's first amendment claim. Twist filed his opposition papers including affidavits and other exhibits, on September 14, 1987. However,

contrary to the provisions of district court Local Rule 108 (h), Twist did not file a required statement of material facts in dispute. Only later, on October 5, 1987, after the Attorney General's reply papers had been served, did Twist file a statement of disputed facts.

The Attorney General's summary judgment motion was heard by the district court on October 8, 1987, and granted by an order entered on October 19, 1987. The district court also denied a pending discovery request by Twist to compel the production of documents in the possession of the OPR.

II

Twist first argues that the district court abused its discretion in accepting as true, the government's statement of material facts not in dispute because he, Twist, had violated district court Local Rule 108 (h) when he failed to submit his counterstatement. The district court, in refusing to accept Twist's statement, relied upon Rule 108 (h) which provides, among other things, that:

> An opposition to [a summary judgment motion] shall be accompanied by a separate concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated, which shall include references to the parts of the record relied on to support the statement... In determining a motion for summary judgment, the court may assume that facts identified by the moving party in its statement of material facts are as admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion.

The party opposing summary judgment is required, under Rule 108 (h), to serve and file its opposition to

the motion, *including its separate statement of issues setting forth the disputed material facts* within 11 days of the date of service of the summary judgment motion. Rule 108 (h) is substantively identical to the former Rule. The purpose for promulgating former Rule 1-9 (h) was explained in *Gardels v. Central Intelligence Agency*, 637 F.2d 770 (D.C. Cir. 1980), where it was said:

> Requiring strict compliance with the local rule is justified both by the nature of summary judgment and by the rule's purposes. The moving party's statement specifies the material facts and directs the district judge and the opponent of summary judgment to the parts of the record which the movant believes support his statement. *The opponent then has the opportunity to respond by filing a counter-statement and affidavits showing genuine factual issues. The procedure contemplated by the rule thus isolates the facts that parties assert are material, distinguishes disputed from undisputed facts, and identifies the pertinent parts of the record.* These purposes clearly are not served when one party...fails in his statement to specify the material facts upon which he relies and merely incorporates entire affidavits and other materials without reference to the particular facts recited therein which support his view that no genuine issue of material fact exists. *Id.* at 773 *Id.* at 773 (emphasis added). *See also McKinney v. Dole*, 765 F.2d 1129, 1135 n.12 (C.C. Cir. 1985).

The importance of complying with the procedures originally established by former Local Rule 1-9 (h), and now continued in Local Rule 108 (h), has been emphasized by the courts of this Circuit. The failure to file a proper Rule 1-9 (h) statement (now a 108 (h) statement) in opposing a motion for summary

judgment, may be fatal to the position of the non-complying party. See *Gardels*, 637 F.2d at 773 (citing cases); *Tarpley v. Greene*, 684 F.2d 1, 6 & n.15 (D.C. Cir. 1980).

In the present case, the government's motion for summary judgment was served and filed on September 1, 1987. Local Rule 108 (b) required the opposing papers to be filed within 11 days of the date of that service, or within such time as the district court may have directed. Twist, in fact, filed his opposition on Monday, September 14, 1987, precisely within the time period (the eleventh day fell on the weekend). However, Twist at that time failed to file the critical 108 (h) "separate concise statement of genuine issues setting forth all material facts as to which [he] contended there exists a genuine issue necessary to be litigated," together with record references. This statement, pursuant to the Rule, was required to accompany Twist's opposition to the government's motion.

On October 5, 1987, the Friday before the scheduled Monday argument, Twist responded to the government's statement. The district court, having been earlier presented with the government's statement consisting of 31 uncontested facts with record references, and with Twist's opposition which had failed to include Twist's counter-statement of genuine issues of fact, relied on Rule 108 (h) to hold that the material facts identified by the government were deemed admitted.

We cannot charge the district court with having abused its discretion by doing so. First, Local Rule 108 (h) explicitly requires the submission of a statement of disputed facts and warns the parties of the possibility of the very sanction ultimately imposed against Twist. Second, the Rule specifically provides the time limits within which such a statement must be served and filed–time limits concededly violated by Twist. Third,

while Twist eventually filed the required statement, it was filed at a time not only beyond that required by the letter of the Rule, but more importantly, at a time which precluded the district court from an effective use of that statement in its preparation to hear and decide the motion.

As *Gardels, supra,* intimates in its examination of the Rule's purpose, a district court judge should not be obliged to sift through hundreds of pages of depositions, affidavits, and interrogatories in order to make his own analysis and determination of what may, or may not, be a genuine issue of material disputed fact. In this respect, a district court may legitimately look to and rely upon counsel to identify the pertinent parts of the record, to isolate the facts that are deemed to be material, and to distinguish those facts which are disputed from those that are undisputed.

When counsel fails to discharge this vital function, he may not be heard to complain that the district court has abused its discretion by failing to compensate for counsel's inadequate effort. In the present case, where the record includes volume upon volume of depositions taken of nine individuals, multiple affidavits, and numerous interrogatories and other discover requests (some of which were answered and others which were not), we cannot ask, nor can we expect, the district court to undertake an independent analysis unaided by counsel. Indeed, the express terms of Rule 108 (h) disclose that this is the precise circumstance which the Rule's requirements were designed to overcome.

Moreover, Twist at no time has ever sought to explain his lack of compliance with Local Rule 108 (h), nor did he ever file a motion in an effort to have the district court accept his tardy submission. We express no opinion as to whether furnishing such explanation, or making such a motion, would excuse delinquent counsel. We leave such decisions wholly to the

discretion of the district court where they should properly rest. However, Twist's failure to explain, or to move, indeed his failure to date to proffer any explanation, even to this court, for his lack of compliance, are relevant matters for our consideration in determining whether the district court properly exercised its discretion. We are satisfied that in the absence of the statement required to be furnished by Twist, the district court did not abuse its discretion in accepting as "admitted" the facts identified by the government in the government's statement of material facts.[3]

III.

As we understand Twist's claim, it is that he was not discharged for insubordination, but rather that he was fired in retaliation for his protected speech.[4]

However, the treatment of this issue in Twist's brief focuses not on "protected speech" but rather on events which Twist claims constituted an obstruction of justice by the Justice Department, an issue not before us. In light of Twist's first amendment claim, it appears to us that the appropriate focus must be on those instances of "speech" which Twist claims were protected and which allegedly gave rise to his termination. In this respect, the critical "protected speech" which may be discerned from this record

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[3] We have no doubt that the result in this case would have been the same even if the district court had considered Twist's tardy Rule 108 (h) statement. The "facts" which Twist asserts are material, are not, in our opinion, material to the issues on appeal, and those "facts" which Twist contends are disputed, do no more than contradict insignificant and immaterial facts asserted by the government.

[4] Just as the district court did not find it necessary to resolve the issue of whether Twist's speech was protected under the circumstances of this case, (A19), we too find it unnecessary, in light of our disposition of Twist's appeal, to address that issue. We observe, however, that the government has argued as an alternative ground, that Twist's speech was not protected.

centers on Twist's two discussions with the law clerk of a district court judge during the period in 1985 that Twist was assigned to the *Cleveland Press* investigation.

The "evidence" suggested by Twist as supporting his contention that he was fired in retaliation for his protected speech, is as follows:

> 1. It was suggested by one of Twist's superiors that Twist begin looking for a new job. This suggestion was made at a meeting during which the subject of Twist's *ex parte* meeting with a district court judge and the judge's law clerk concerning Twist's obstruction of justice claim, was discussed.
>
> 2. That in August of 1985 he was given a poor evaluation which included criticism of his contact with the law clerk. (A123-24)
>
> 3. That he was refused a promotion for the same reason. (A128).
>
> 4. That the notice giving him 90 days to improve his performance included criticism of his contact with the law clerk. (A132-39).[5]

We observe that it is immaterial whether Twist admitted making the statements attributed to him. Hils charged that Twist made these statements and Twist has never denied or contradicted this fact. Moreover, the fact of Twist's threats pertains not to the issue of retaliatory firing for protected speech, but rather to the issue of insubordination and the Department of Justice's perception of his insubordinate conduct.

However, in order for Twist to prevail in his retaliatory claim, he must demonstrate that the speech

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[5] Twist also claims that he did not admit, during his hearing before Assistant Attorney General Ginsburg, that he had in fact made threatening statements to his supervisors. (A136).

at issue was a substantial or motivating factor in the government's decision to fire him. *Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). The district court addressed this subject in its opinion which granted summary judgment to the government. The district court stated:

> The controlling material facts are not disputed. The basic background and course of events leading to Twist's termination are presented in the Department's 31 precise statements of uncontested facts, each well referenced to documents, transcripts, etc. Twist's opposition, filed by his attorney, contains no counterstatement of genuine issue of fact. Thus, pursuant to the last sentence of Rule 108 (h) of the Rules of this Court, the Department's statement of material undisputed facts is accepted. D.D.C. Rule 108 (h) (effective June 30, 1987). The crucial issue that remains is therefore not whether plaintiff was insubordinate and discourteous and frequently showed poor judgment. These facts are well established and uncontroverted. Twist contends, however, that his discharge, in fact, resulted from exercise of his first amendment rights.
>
> * * * *
>
> Twist's termination occurred considerably after [his communications with the law clerk]. His discharge for insubordination was requested by two of his superiors based on events occurring in their presence. Examples of his misconduct were recited in letters dated June 23, 1986 and July 8, 1986. Douglas H. Ginsburg, then Assistant Attorney General for Antitrust, conducted an on-the-record hearing where he

provided Twist full opportunity to respond to these letters.

Mr. Ginsburg has testified, by deposition, that following this hearing, he decided to recommend discharge based solely on the aforementioned letters reinforced by examples of Twist's poor judgment such as those outlined in the Department's statement of undisputed facts which stands uncontroverted. He denies, under oath, that Twist's communications to the judge, directly or through the law clerk, played any pat in his final decision. The Deputy Attorney General approved Mr Ginsburg's recommendation for discharge after receiving further written representations from Twist.

* * * *

Twist continues to urge, however, that his discharge occurred because he spoke to the judge and law clerk claiming Department's officials were obstructing justice.

Twist's claim that he was discharged because of his statements to the judge and the law clerk rests almost entirely on his unsupported surmise. He offers nothing more than a colorable inference, snatching at a few unconnected bits of proof in an attempt to overcome the solid documentary and sworn testimony to the contrary. (A16-19).

We agree with the district court's reading and analysis of the record. In contrast to the government's overwhelming proof that Twist was terminated because of his insubordinate and disrespectful conduct, Twist has furnished no evidence that his discharge was prompted by his conversations with the judge and the judge's law clerk. It was apparently those meetings

with the judge and his law clerk, among other things, which led to Twist's unsatisfactory performance rating and to doubts about Twist's judgment.[6] However, the record discloses that Twist was not discharged in June 1985 when he was removed from the *Cleveland Press* investigation. Rather, Twist was terminated in August 1986, some 14 months later and then only after the two disruptive meetings held in June and July 1986 with Hils, the Acting Chief of the Cleveland Field Office.

Those meetings gave rise to the two letters sent by Hils to Assistant Attorney General Ginsburg. The letters detailed, with great particularity, Twist's insubordinate actions, none of which Twist has denied or contradicted.[7]

The letters reveal that Twist refused an assignment concerning a concrete pipe investigation; that Twist, without basis, accused Hils and two other Department attorneys of lying about an unrelated matter; and that Twist sought to intimidate Weedon and undercut Weedon's authority in making assignments. The letters also charged Twist with claiming that the scheduled Friday meetings were part of a criminal cover up, and asserting that if Hils participated in and conducted the June 20, 1986 meeting he, Hils would be guilty of misprision of a felony. In addition, Hils' letters brought out that Twist had failed to comply with Weedon's directions to produce certain draft memoranda and that Twist was otherwise disrespectful and insubordinate.

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[6] See Defendant's Statement of Material Facts as to Which Defendant Contends There is no Material Dispute, filed September 1, 1987, paragraphs 19 & 22.

[7] In Twist's tardy statement of material facts in dispute, (a document which we have held was properly not accepted by the district court), Twist asserts that "[p]laintiff did not tell Mr. Hils at the July 3, 1986 meeting that he would file a suit against him if he continued the meeting." (A361). This is the only evidence, if accepted, which refutes any aspect of the government's claim that Twist was fired for insubordination.

A fair reading of the letters written by Hils, who was Twist's superior, convey the unmistakable fact (a fact never denied by Twist) that Twist's conduct towards his superiors was insubordinate and disrespectful. Indeed, the declaration filed by then Assistant Attorney General Ginsburg, states unequivocally that his decision to recommend Twist's discharge was based solely upon the incidents set forth in the June 25, and July 8, 1986 letters. Those letters led him to conclude that "Mr. Twist's insubordinate and disrespectful conduct towards his supervisors was unexcused and likely to recur." (A326). Ginsburg's recommendation reflected his conclusion

> that Mr. Twist's conduct had been designed to impede, through threats and intimidation, Mr. Hils' performance of his supervisory duties. I regard this conduct alone as sufficient to warrant Mr. Twist's removal because of its highly detrimental effect on the efficient operation of the office. I also thought it likely that Mr. Twist would persist in this conduct unless removed from his position. (A326-27)

It was after the hearing conducted by Ginsburg on July 9, 1986, that Ginsburg's August 4, 1986 "Action Memorandum." (A292), was forwarded to the Deputy Attorney General who ultimately discharged Twist. That memorandum, to which were attached the letters from Hils, the transcript of the July 9, 1986 hearing, and Twist's reply of July 22, 1986 hearing, and Twist's reply of July 22, 2986, summarized Twist's insubordinate actions. The memorandum then set forth Ginsburg's conclusions leading to his recommendation of discharge because of Twist's "repeated outrageous behavior." *Id.* Nowhere in that recommendation is there mention, or even an intimation, of Twist's conversation with the judge and the judge's law clerk.

Thus, as the district court observed and as we have concluded, Twist has failed to present any probative evidence from which it could be even inferred that Twist's conversations with a district court judge, and the judge's law clerk, bore in any way on Twist's dismissal--a burden which Twist must meet to avoid summary judgment. See *Catrett v. Johns-Manville Sales Corp.* 826 F.2d 33, 39 (D.C. Cir 1987), *cert denied*, ---- U.S.----, 108 S.Ct. 1028 (1988).

Fed. R. Civ. P. 56 (c) directs that summary judgment is to be granted if the record shows: that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. We have been instructed that " there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The Supreme Court, in *Anderson*, equated the summary judgment standard with the standard employed for a directed verdict. Thus, because our review is plenary, the question before us, as it was before the district court, becomes:

> whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that a party must prevail as a matter of law.

Id. at 251-52. See also *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). After independently reviewing the evidence in the instant record, we agree with the district court that "[g]iven the mass of undisputed proof no reasonable trier of fact could find for Twist." (A19).

V.

Twist also contends that his termination violated his fifth amendment rights because he held a property interest in his employment. In support of this claim, Twist cites to *Cleveland Board of Education v. Loudermill*,

470 U.S. 532 (1985) and relies upon 5 U.S.C. s 2302 (b) (10) as the statute which creates his property interest. This argument requires only brief discussion inasmuch as the issue raised by Twist is exactly the same issue which we have decided today in *Garrow v. Gramm*, No. 87-5273, slip op. (D.C. Cir. August 23, 1988).

Like the discharged employee in *Garrow*, Twist is a nonveteran, "Excepted Service" employee. In *Garrow* we have held that such an employee does not possess a due process right to his job and that 5 U.S.C. s 2302 (b) (10) does not provide a property interest in continued employment. Thus, *Garrow's* holding controls, and is fatal to, the claim made here by Twist. Moreover, given the fact that Twist received advance notice, an on-the-record hearing, and an opportunity to submit a written answer to the charges against him, even if Twist had a property right to his continued employment, which we have held he does not, he has received all the process to which he would be due.

VI.

On the date that the district court granted summary judgment to the government it also denied Twist's motion for discovery of a report produced by the Justice Department's Office of Professional Responsibility regarding Twist's allegations of an obstruction of justice. Twist also sought the underlying documentation on which the report was based.

The district court denied Twist's discovery motion holding: "Defense counsel does not have access to these records, which are protected by grand jury privilege. There is no indication that any matters before the Board were considered in the decision to discharge. The Board eventually reported unfavorably on all of plaintiff's charges. No purpose could be served by disclosure and no need has been shown." (A11).

Twist, on whom the burden fell to demonstrate the relevance of the OPR report to his first amendment

claim, has failed to develop a record which would require the production of that report. Nothing appears of record that even indicates, let alone establishes, that the report was considered by those responsible for Twist's discharge or that the report even referred to Twist's claim of "protected speech" retaliation. Indeed, TWist had ample opportunity, while conducting his discovery inquiries, to develop just such a record. In the absence of a showing of relevance, the district court did not abuse its discretion in denying Twist's motion. See *United States v. West*, 672 F.2d 796 (10th Cir.), *cert denied*, 457 U.S. 1133 (1982).

Moreover, we have carefully examined the notes of transcript pertaining to the district court's hearing of Twist's motion, and it is clearly evident that the district court considered and weighed numerous factors including relevancy, privilege, and grand jury secrecy, before exercising its discretion and concluding that the report would not be disclosed.[8] Indeed, even apart from considerations of privilege and grand jury secrecy, absent a showing of relevancy, we are satisfied that the district court did not abuse its broad discretion in denying Twist's motion.

VII.

We will affirm the district court's October 19, 1986 order denying Twist's discovery motion. We will also affirm the orders of the district court dismissing Twist's Fifth Amendment claim and granting summary judgment to the government on Twist's First Amendment claim.

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[8] Among other factors, the district court noted that it was the trier of fact. The district court stated: And I've got a non-jury matter in front of me so I can't do what I normally do, which would be to ask for the [OPR] report, take a look at the report, draw some conclusions from looking at the report as to whether or not there was anything in there that might be useful, you see. But I can't--I don't think I should do that when I'm the finder of facts. (A78).

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-5371 September Term, 1988

C.A. No. 86-03220

CHARLES RUSSELL TWIST, APPELLANT

v.

EDWIN MEESE, ATTORNEY GENERAL,
U.S. DEPARTMENT OF JUSTICE, APPELLEE

On Appeal from the United States District Court
for the District of Columbia

Before HOWARD T. MARKEY,* *Chief Judge*, and DANIEL M. FRIEDMAN,* *Circuit Judges* for the Federal Circuit and LEONARD I. GARTH,** *U.S. Senior Circuit Judge* for the Third Circuit.

ORDER

On consideration of appellant's petition for rehearing and suggestion for rehearing *en banc*, it is

* Sitting by designation pursuant to 28 U.S.C. section 291(a).

** Sitting by designation pursuant to 28 U.S.C. section 294 (d).

ORDERED, By the Court, that the petition for rehearing is denied, and every judge in regular active service on the Court having recused himself or herself, the suggestion for rehearing *en banc* is denied.

FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY:
Robert A. Bonner
Deputy Clerk

APPENDIX C

In the United States District Court

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Charles Russell Twist	)	
	)	
	)	Civil Action No. 86-3220
Plaintiff,	)	
	)	
v.	)	
	)	
EDWIN MEESE, III, ATTORNEY GENERAL	)	
	)	
	)	
Defendant.	)	

MEMORANDUM

Twist, an attorney formerly employed by the Antitrust Division of the Department of Justice, has challenged his removal from government employment for insubordination and disrespectful conduct in dealing with his supervisors. The Department has moved for summary judgment after ten depositions and extensive discovery by the parties into all issues. Briefs have been considered and argument heard.

The controlling material facts are not disputed. The basic background and course of events leading to Twist's termination are presented in the Department's 31 precise statements of uncontested facts, each well referenced to documents, transcripts, etc. Twist's opposition, filed by his attorney contains no counterstatement of genuine issues of fact. Thus, pursuant to the last sentence of Rule 108 (h) of the Rules of this Court, the Department's statement of material undisputed facts is accepted. D.D.C. Rule 108

(h) (effective June 30, 1987). The crucial issue that remains is therefore not whether plaintiff was insubordinate and discourteous and frequently showed poor judgment. These facts are well established and uncontroverted. Twist contends, however, that his discharge in fact resulted from exercise of his First Amendment rights.

Twist was involved as a government attorney in an ongoing grand jury investigation and had learned that certain individuals would be called to testify and thus given immunity. He opposed seeking immunity for these individuals and made representations to a U.S. District Judge and the judge's law clerk suggesting, if not flatly stating, that his superiors in the Antitrust Division were attempting in this fashion to obstruct justice. He contends that his superiors resented these communications and that he was discharged for this reason.

Twist's termination occurred considerably after these events. His discharge for insubordination was requested by two of his superiors based on events occurring in their presence. Examples of his misconduct were recited in letters dated June 23, 1986 and July 8, 1986. Douglas H. Ginsburg, then Assistant Attorney General for Antitrust, conducted an on-the-record hearing where he provided Twist full opportunity to respond to these letters.

Mr. Ginsburg has testified by deposition that following this hearing he decided to recommend discharge based solely on the aforementioned letters reinforced by examples of Twist's poor judgment such as those outlined in the Department's statement of undisputed facts which stands uncontroverted. He denies, under oath, that Twist's communications to the judge, directly or through the law clerk, played any part in his final decision. The Deputy Attorney General approved Mr. Ginsburg's recommendation for

discharge after receiving further written representations from Twist.

It is significant that at the time of the termination hearing Mr. Ginsburg had already taken specific action with respect to Twist's obstruction of justice claims. The matter had been referred to the Department's Board of Professional Responsibility for full investigation, together with Twist's related grievance that his performance rating had been adversely affected by his communications with the judge. Well after the termination and after an apparently thorough inquiry, the Board determined that Twist's claims were unsupported.[1] The Department's review of Twist's charges of obstruction of justice indicates these claims were not taken lightly; rather, they were treated seriously and considered separately from his subsequent, insubordinate and disrespectful conduct.

Twist continues to urge, however, that his discharge occurred because he spoke to the judge and law clerk claiming Department officials were obstructing justice. He is an excepted employee and given the uncontested facts he cannot prevail unless he establishes his discharge contravened his constitutional rights. If he prevails on this First Amendment claim, a decision would then have to be made as to whether or not Twist's speech was protected given the special circumstances of this case. See *Connick v. Meyers*, 461 U.S. 138 (1983). The parties have briefed and argued this complex issue but it need not be decided.

Twist's claim that he was discharged because of his statements to the judge and the law clerk rests almost entirely on his unsupported surmise. He offers nothing more than a colorable inference, snatching at a few unconnected bits of proof in an attempt to overcome

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[1] The evidence before the Board and its report are not in the record. Twist's effort to obtain some or all of these materials is the subject of a separate motion and Order.

the solid documentary and sworn testimony to the contrary.

This is a clear case for disposition by summary judgment under Rule 56. Not only has the Department presented explicit proof negating Twist's claim, but Twist, who has the ultimate burden, has wholly failed to present specific facts or significant probative evidence to establish that his conversations with the judge and the judge's law clerk contributed in any way to his discharge. Without significant evidence as to this essential element he cannot recover. Given the mass of undisputed proof no reasonable trier of fact could find for Twist. There is no genuine issue of material fact. See *Celotex Corp v. Catrett*, 106 S.Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986).

The motion of the Department of Justice for summary judgment is granted, with costs to be fixed by the Clerk. An appropriate Order is filed herewith.

Gerhard H. Gesell

UNITED STATES DISTRICT JUDGE

October 19, 1987

APPENDIX D

In the United States District Court

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Charles Russell Twist	)	
	)	
	)	Civil Action No. 86-3220
Plaintiff,	)	
	)	
v.	)	
	)	
EDWIN MEESE, III,	)	
ATTORNEY GENERAL	)	
	)	
	)	
Defendant.	)	

ORDER ON DISCOVERY MOTIONS

At oral argument on plaintiff's various discovery motions it appeared that the only remaining issue involves whether or not plaintiff should be given access to the investigation records and/or report of the Department's Board of Professional Responsibility which inquired into plaintiff's grievance and obstruction of justice charge. Defense counsel does not have access to these records, which are protected by grand jury privilege. There is no indication that any matters before the Board were considered in the decision to discharge. The Board eventually reported unfavorably on all of plaintiff's charges. No purpose could be served by disclosure and no need has been shown.

SO ORDERED.

Gerhard H. Gesell

UNITED STATES DISTRICT JUDGE

October 19, 1987.

APPENDIX E

In the United States District Court
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Charles Russell Twist	)	
	)	
	)	Civil Action No. 86-3220
Plaintiff,	)	
	)	
v.	)	
	)	
EDWIN MEESE, III,	)	
ATTORNEY GENERAL	)	
	)	
	)	
Defendant.	)	

MEMORANDUM

Plaintiff Twist, formerly an attorney in the Antitrust Division of the Department of Justice, sues the Attorney General in his official capacity alleging that he was unlawfully terminated on August 15, 1986. He seeks a declaration that his termination violated his first and fifth amendment rights and claims he is entitled to an injunction reinstating him with back pay and prohibiting acts of reprisal. Defendant has moved to dismiss for failure to state a claim upon which relief can be granted. After consideration of defendant's motion, Twist's opposition, defendant's reply and the various exhibits filed, the Court has determined the complaint must stand undismissed so far as it recites a violation of Twist's first amendment rights.

It appears from the motion papers that at the time he was terminated Twist was a GS-14 employee in the

Great Lakes, Michigan office of the Antitrust Division of the Department of Justice. In may 1985, while aiding a grand jury inquiry, he came to believe some of his superiors were engaged in a conspiracy to obstruct the investigation by proposing to seek immunity for persons targeted by the inquiry. He states he brought his concerns to the attention of other higher superiors, who referred the matter to the Department's office of Professional Responsibility, but when this Office did not act promptly he twice told the judge who had empaneled the grand jury of the conspiracy he suspected and also informed the United States Attorney. Thereafter, he alleges, his actions were criticized by the superiors he believed were conspiring and he was ultimately terminated on their recommendation, "for the good of the service," by an official letter after questioning by the Assistant Attorney General for the Antitrust Division.

While the first amendment claim is vigorously disputed by defendant it cannot be resolved on a motion to dismiss. Twist alleges, in essence, that he is a "whistleblower" who has been penalized for revealing illegal official action.[1] Defendant contends Twist's conspiracy allegations were not a substantial motivating factor underlying the termination but rather

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[1] Plaintiff's claim would appear to be proper for submission to the Office of Special Counsel under 5 U.S.C. s 1206 (1982) on the claim that defendant's action constituted reprisal against a whistleblower constituting a prohibited personnel practice under 5 U.S.C. s 2302 (b) (8) (A) (1982). This provision was a major component of the Civil Service Reform Act of 1978 and provides streamlined procedures designed to encourage responsible whistleblowing that are superior in many respects to judicial procedures. *See Spagnola v. Mathis*, 809 F.2d 16, 21-22 (D.C. Cir. 1987), *reh'g en banc granted in part*, Jan. 6, 1978. Despite the efficacy of these procedures there appears to be no requirement that plaintiffs must exhaust them before seeking relief in court, *see Borrell v. United States Intn'l Communications Agency*, 682 F.2d 981, 984-85 (D.C. Cir. 1982), and plaintiff's request for reinstatement is within the power of the Court to grant, *see Hubbard v. EPA*, 809 F.2d 1, 11-12 (D.C. Cir. 1986), *reh'g en banc granted in part*, 1986.

that Twist was terminated for insubordinate and unprofessional conduct principally involving his failure to cooperate in meetings called by supervisors to monitor his work and his threats of legal action against them for scheduling meetings to review his work, coupled with generally disrespectfully behavior. Twist insists these meetings and other demands of suspect supervisor involved were in retaliation to his conspiracy allegation.

Defendant recognizes the reason for termination is disputed but seeks dismissal on the ground that as a matter of law Twist did not engage in protected speech. As a government employee speaking in an employment context, to obtain first amendment protection Twist must ultimately prove both that his speech was a matter of public concern and that his interest in speaking outweighed the government's interest, as an employer, "in the effective and efficient fulfillment of its responsibilities to the public." *Connick v. Meyers*, 461 U.S. 138, 146 (1983).

Here the involved speech implicated a matter of public concern. Defendant suggests that his interest in the proper exercise of his prosecutorial responsibilities outweighed any contrary interest Twist may have had in speaking at the time and in the manner he chose. Whether Twist's speech threatened to impede the investigation by prejudicing the judge, endangered any grant of immunity that was being considered, lacked substance, was inappropriate procedurally, avoided established channels, or threatened substantial disruption of working relationships within the Antitrust Division are all fact questions to be explored at a later date.

Given a motion to dismiss the Court is limited to ruling on the sufficiency of the bare allegations in the complaint. The claim, as amplified on the motion, recites that Twist reasonably believed his superiors were conspiring to obstruct justice and that he brought

this belief to the attention of appropriate Department of Justice officials, and that when they took no action he informed the empaneling judge and the United States Attorney. These allegations are minimally sufficient to establish the arguably protected nature of the speech. The first amendment claim must therefore be held for future proceedings.

Twist also claims his termination violated his fifth amendment due process rights because he enjoyed a property interest in his position which barred termination except for good cause after pre-termination notice and a hearing; he claims these protections were not provided. Such a property interest is implicated only if Twist had a "legitimate claim of entitlement" to his position based on an independent rule or understanding of law. Board of *Regents v. Roth*, 408 U.S. 564, 577 (1972). Twist fails this test because he was an "excepted service" employee under 5 U.S.C. s 2103 (a))1982), *see* 5 C.F.R. s 213.3102 (b) (1986). Excepted service employees who are not veterans lack any statutory entitlement to their position that could generate a protected property interest. See, e.g., *Doe v. Department of Justice*, 753 F.2d 1092, 1097 n.4, 1100 n.8 (D.C. Cir. (1985). Only "competitive service" employees as defined by 5 U.S.C. s 2102 (a) (1) (1982) possess a protected property interest as they are shielded from removal except for cause under 5 U.S.C. s 7513 (1982).

Twist argues that one of the "prohibited personnel practices" established by the Civil Service Reform Act of 1978 and codified at 5 U.S.C. 2303 (b) (10) (1982) grants him a property interest in his excepted service position. That provision in part prohibits discrimination against an employee "on the basis of conduct which does not adversely affect the performance of the employee...." It has two effects. Substantively, it makes clear that where a competitive service employee is removed for cause pursuant to 5 U.S.C. s 7513, the ground for removal must have a

rational nexus with the employee's duties. *Merritt v. Department of Justice*, 6 M.S.P.R. 493, 508 (1981). Jurisdictionally, it allows competitive service employees and most excepted service employees (including Twist), *see* 5 U.S.C. 2302 (a) (2) (1982), to complain under 5 U.S.C. s 1206 (1982) of prohibited personnel practices to the Office of Special Counsel. *Merritt, supra*, 6 M.S.P.R. at 506-08. It does not confer any form of property interest in a government position.[2]

All claims for relief in the complaint will be dismissed except the first amendment claim. An appropriate Order is filed herewith.

Gerhard H. Gesell

_____

UNITED STATES DISTRICT JUDGE

April 2, 1987

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[2] Plaintiff's reliance on *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985) in arguing he had a protected property right is misplaced, as Loudermill addresses the pre-termination process due once a property right has been established, which was conceded in the case, *see id.* at 535, 539. In any event, plaintiff received pre-termination review sufficient to satisfy the Loudermill standard, *see id.* at 546: he received notice of the charges against him, an account of defendant's evidence, and an opportunity to present his view of the facts. Plaintiff's request for a declaration that the termination violated his rights under 5 U.S.C. 4303 (1982) is also misplaced as that section, prescribing procedures for reductions in grade or removals for unacceptable performance, is not implicated by the facts plaintiff presents and in any event does not apply to non-veteran excepted service employees such as plaintiff. *Doe, supra*, 753 F.2d at 1097 n.4.

APPENDIX F
CONSTITUTIONAL PROVISION, STATUTE AND RULES

Amendment 1 to the Constitution of the United States

Congress shall made no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

28 C.F.R. Part 45—Standards of Conduct

Section 45.735-1

(a) In conformity with sections 201 through 209 of title 18 of the U.S. Code (as enacted by Pub. L. 87-849) and other statutes of the United States, and in conformity with Executive Order 11222 of May 8, 1965, and 5 CFR Chapter I, Part 735, relating to conflicts of interest and ethical standards of behavior, this part prescribes policies, standards and instructions with regard to the conduct and behavior of employees and former employees (as defined in Section 45.735-3 (b) and (d) respectively) of the Department of Justice.

(b) This part, among other things, reflects prohibitions and requirements imposed by the criminal and civil laws of the United States. However, the paraphrased restatements of criminal and civil statutes contained in this part are designed for informational purposes only and in no way constitute an interpretation or construction thereof that is binding upon the Department of Justice or the Federal Government. Moreover, this part does not purport to paraphrase or enumerate all restrictions or requirements imposed by statutes. Executive orders, regulations or otherwise upon Federal employees and former Federal employees. The omission of a reference

to any such restriction or requirement in no way alters the legal effect of that restriction or requirement and any such restriction or requirement, as the case may be, continues to be applicable to employees and former employees in accordance with its own terms. Furthermore, attorneys employed by the Department should be guided in their conduct by the Code of Professional Responsibility of the American Bar Association. Interpretations and applications of the Code to an attorneys official duties should be obtained pursuant to Section 45.735-2(e).

(c) Any violation of any provision of this part shall make the employee involved subject to appropriate disciplinary action which might be prescribed by statute or regulation.

28 Revised as of July 1, 1988

Federal Rules of Civil Procedure

RULE 1. Scope of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

As amended Dec. 29, 1948, eff. Oct. 20, 1949, Fed. 28, 1966, eff. July 1, 1966.

RULE 26. General Provisions Governing Discovery

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods; depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burden some or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice pr pursuant to a motion under subdivision (c).

RULE 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary

judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As amended Dec. 27, 1946, eff. Mar. 19, 1948/

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. As amended Dec. 27, 1946, eff. Mar 19, 1948; Jan. 21, 1963, eff. July 1, 1963.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantials controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the

facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Rule 83. Rules by District Courts

Each district court by action of a majority of the judges thereof may from time to time, after giving appropriate public notice and an opportunity to comment, make and amend rules governing its practice not inconsistent with these rules. A local rule so adopted shall take effect upon the date specified by the district court and shall remain in effect unless amended by the district court or abrogated by the judicial council of the circuit in which the district is located. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public. In all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act.

As amended apr. 29, 1985, eff. Aug. 1, 1985

Code of Professional Responsibility

DR 1-102 Misconduct

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(2) Circumvent a Disciplinary Rule through actions of another.

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 1-103 Disclosure of Information to Authorities

(A) A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

DR 7-102 Representing a Client Within the Bounds of the Law.

(B) A lawyer who receives information clearly establishing that:

(1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

Local Rule

Rule 108. Motions

(a) Statement of points and authorities. Each motion shall include or be accompanied by a statement of the specific points of law and authority that support the motion, including where appropriate a concise statement of facts. If a table of cases is provided, counsel shall place asterisks in the margin to the left of those cases or authorities on which counsel chiefly relies.

(b) Opposing points and authorities. Within 11 days of the date of service or at such other time as the court may direct, an opposing party shall serve and file a memorandum of points and authorities in opposition to

the motion. If such a memorandum is not filed within the prescribed time, the court may treat the motion as conceded.

(c) Proposed order. Each motion shall be accompanied by a proposed order.

(d) Reply memorandum. Within five days after service of the memorandum in opposition the moving party may serve and file a reply memorandum.

(e) Page limitations. A memorandum of points and authorities in support of or in opposition to a motion shall not exceed 45 pages and a reply memorandum shall not exceed 25 pages, without prior approval of the court. Documents that fail to comply with this provision shall not be filed by the Clerk.

(f) Oral hearings. A party may in a motion or opposition request an oral hearing, but its allowance shall be within the discretion of the court. If at the time of the hearing the moving party fails to appear, the court may treat the motion as withdrawn; if the opposing party fails to appear, the court may treat the motion as conceded.

(g) Motions to vacate default; verified answer. A motion to vacate an entry of default, or a judgment by default, or both, shall be accompanied by a verified answer presenting a defense sufficient to bar the claim in whole or in part.

(h) Motions for summary judgment. Each motion for summary judgment shall be accompanied by a statement of material facts as to which there is no genuine issue, which shall include references to the parts of the record relied on to support the statement. An opposition to such a motion shall be accompanied by a separate concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated, which shall include references to the parts of the record relied on to support the statement. Each such motion and opposition must also contain or be

accompanied by a memorandum of points and authorities required by sections (a) and (c) of this rule. In determining a motion for summary judgment, the court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion.

(i) Motions to amend pleadings. A motion for leave to file an amended pleading shall be accompanied by an original of the proposed pleading as amended. The amended pleading shall be deemed to have been filed and served by mail on the date on which the order granting the motion is entered.

(k) Names of persons to be served with proposed orders, judgments and stipulations. Each proposed order, judgment and stipulation shall have appended to it or endorsed upon it a list of the names and addresses of all attorneys entitled to be notified of its entry. If a party is not represented by an attorney, the name and address of the party shall be included. (Amended, May 1, 1987; Mar. 4, 1988.)

INDEX TO APPENDIX G

Documents in this appendix are contained in the Joint Appendix filed with the Court of Appeals for the District of Columbia Circuit in this case. Important documents filed with the Circuit Court are not included in this appendix due to space limitations.

The reference numbers below [JA 000] are the same page numbers used in the Joint Appendix filed with the Circuit Court.

The Petitioner urges the Court to obtain the depositions in this case and the complete Joint Appendix.

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APPENDIX G

U.S. Department of Justice
Antitrust Division
Washington, D.C. 20530

March 25, 1985

Office of the Assistant Attorney General

MEMORANDUM

TO: John A. Weedon
Chief, Cleveland Field Office
Antitrust Division

FROM: J. Paul McGrath
Assistant Attorney General
Antitrust Division

RE: Cleveland Press Grand Jury Matter

Following the recent discussions on this matter, I have authorized a two-month continuation of this grand jury investigation on the following understanding:

1. We opened the investigation because of strong suspicion that this transaction involved a Section 1 conspiracy along these lines: the parties realized

that an acquisition of the Press by Newhouse would have violated the antitrust laws, and thus they devised a sham transaction under which (1) Newhouse would buy at extraordinarily inflated amounts the Press subscription list and the DelCom business and (ii) there would be a side-deal that the operating assets of the newspaper would be disposed of in such a manner that Newhouse would not thereafter be faced with competition in Cleveland. This made the large purchase price attractive, because Newhouse would then be in a monopoly position and thus would be able to charge more for advertising. The transaction would be structured so as to avoid a Hart-Scott-Rodino filing.

JA 104

2. Last year, after extensive discussions, we recognized that our only realistic chance of supporting a criminal indictment was direct testimony from one of the three principal actors (Newhouse, Cole or Maloney) along the lines set forth in paragraph 1 above. Accordingly, I authorized a grand jury with the understanding that we would be at a position to make a "go or no go" by last week. You have informed me that you do not have direct evidence to support the case outlined above, but that you have not yet taken grand jury testimony from the three principals and that it would also be helpful if you first obtained testimony from four lawyers involved in the transaction. You indicated that you would take the testimony of the four lawyers in mid-April and of the three principals in mid-May. Each of the seven would be immunized before testimony. We did, of course, all agree last year that, if a criminal case were authorized, it would only be authorized against corporate, and not individual,

defendants.

3. Based on the above, I authorized a continuation of this grand jury investigation for an additional two months from now, with a view to making a final decision on how to proceed at that point.

cc: M. Leddy
J. Widmar
A. Abbott

[Note to the Supreme Court: There is significant marginalia on this document.]

Subject: Cleveland Plain Dealer Acquisition of Assets of Cleveland Press

Date: October 2, 1985
FILE: 60-127-037-46

To: The Files
From: Paul L. Binder and Barbara M. Brown

REPORT OF TELEPHONE CONVERSATION
WITH: George R. "Red" Simmons
Special Agent
U.S. Department of Defense
Defense Criminal Investigative Service
Room 1441
1240 East Ninth Street
Cleveland, Ohio 44199

ON: September 23, 1985

BY: Paul L. Binder
Barbara M. Brown
Irving Rosner

During the course of a luncheon discussion with Simmons, Simmons asked if we worked on the Press/Plain Dealer investigation. We told Simmons that we did not. Simmons said that he heard that Jackie Presser received $30,000 from Joe Cole. We did not respond. Simmons said that Presser and Cole are friends.

U.S. Department of Justice
Washington, D.C. 20530
November 27, 1985

To: C. Russell Twist
Attorney, Cleveland Office
Antitrust Division

From: Nell Minow
Special Assistant to the
Assistant Attorney General
Antitrust Division

RE: Postponement of Decisions Regarding
Pending Personnel Actions

At the request of the Office of Professional Responsibility, the Antitrust Division will delay consideration of your pending performance rating appeal and promotion denial until such time as their investigation is concluded and decision is issued. We expect this decision in the next several weeks.

cc: David Bobzein
Office of Professional
Responsibility

JAWeedon:ce/ 105 DRAFT #1/01-08-86

C. Russell Twist
Great Lakes Office
Antitrust Division
995 Celebrezze Office Building

Cleveland, Ohio 44199

Dear Russell:

This is notice that I propose to remove you from your position of Trial Attorney (Antitrust Division) GS-905-14, with the Great Lakes Office, Antitrust Division, no sooner than thirty (30) days from your receipt of this letter. This action is being proposed in accordance with Department of Justice Order DOJ 1430.3, dated February 28, 1980, and applicable Civil Service laws and regulations.

* * *

JA 170

U.S. Department of Justice
Office of Professional Responsibility
Washington, D.C.

March 7, 1986

Marilyn A. Bobula, Esquire
2645 East Overlook Road
Cleveland, Heights, Ohio 44106

Dear Ms. Bobula:

We are in receipt of a letter dated March 5, 1986, from Mr. David M. Spotts, an attorney who states he represents you "in connection with various personnel matters" relating to your employment with the Department of Justice. Mr. Spotts' letter states that he has counseled you to impose certain "safeguards" as conditions precedent to your consenting to a "voluntary" interview by this Office. These "safeguards"/

conditions are completely unacceptable. Further, they evidence a lack of understanding of the functions of this Office and of your obligations as an employee of the Department of Justice. Permit me to enlighten you.

As an employee of the Department, you are under an obligation,employed by the Attorney General, to report "all allegations against Department employees, legal and nonlegal, involving violations of law, Departmental regulations, or Departmental standards of conduct" to the Office of Professional Responsibility. (Memorandum from the Attorney General to Heads of all Offices, Bureaus, boards, and Divisions and all U.S. Attorneys, dated February 16, 1982, attached.) Your failure to report such allegations, or refusal to cooperate in any inquiry or investigation which may ensue, constitutes an offense punishable by Discipline and Adverse Actions, dated April 27, 1981.) There is nothing voluntary about this procedure and you are not in a position to withhold your consent to it or to impose any conditions on your cooperation.

Since receiving the material that contained your written allegations of misconduct, from the Antitrust Division in October, 1985, this Office has encountered obstacles to our attempts to get to the bottom of your charges, such as we have never been confronted with in any other inquiry. Up to this point, that has not been your fault. Regardless of that, a great deal of time has already been invested by this Office with little substantive result, and we can spend no additional time concerned with peripheral, preliminary matters. Accordingly,I am asking the Assistant Attorney General of the Antitrust Division to order you to report to our office in Room 4306, Main Justice Building, on Tuesday, March 11, 1986, at 10:00 a.m., to submit to an interview concerning the allegations you have made, and to remain there until you are excused. I

assume since you are one of the two individuals who made the initial allegations that gave rise to this inquiry that there will not be any need to define for you the "scope" of this inquiry. (see Mr. Spotts' letter in which he refers to the "vagueness" of the scope of our investigation.)

As previously agreed, you will be provided, at government expense, with a copy of the transcript of your interview and will be permitted to retain it. (We will mail your copy as soon as we receive it from the court reporter who works for us on a "five working day" basis.)

We endeavor always to treat every employee in a civil and professional manner and we do not intend our insistence on the March ll interview at our office to be construed by you as a departure from that approach. We must, however, ensure that our investigations are conducted in a timely manner and that our employees fulfill their obligations to the Department.

Sincerely,

Michael E. Shaheen, Jr.
Counsel

cc: Douglas H. Ginsburg
Assistant Attorney General
Antitrust Division
David M Spotts, Esquire

JA 172

UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
OFFICE OF PROFESSIONAL RESPONSIBILITY

Interview of: CHARLES RUSSELL TWIST
In Re: OPR Investigation
No. A850261

Tuesday, March 18, 1986
Room 430
10th and Constitution, N.W.
Washington, D.C.

The interview commenced at 10:10 a.m.

PRESENT:

DAVID P. BOBZIEN, Esq.

KEITH THOMAS
Office of Professional Responsibility
U.S Department of Justice
Washington, D.C. 20530

JA 173

Mr. Twist: And I'd like to introduce another memorandum, dated March 10, 1986, from Marilyn A. Bobula to Michael E. Shaheen, in which she sets out what both of us feel we would like to see from the Department int he way of safeguards for us.

I do not request the immunity that she does, but I would request the protection that this Office requires under its mandate for reprisals by the Department of Justice, and specifically ask the Office of Professional Responsibility to correct the retaliation that has been directed towards me and to stop further retaliation.

This memorandum is CRT-7

(The document referred to was marked for identification as Exhibit No. CRT-7.)

Mr. TWIST: So I again wish to state that I don't waive any of my rights and would feel more comfortable if I had an opportunity to discuss this entire situation with an attorney, and if an attorney could be present during the interview.

Mr. Bobzien: Do you have anything else to state, Russell, before we address these?

Mr. TWIST: Not that I can immediately think of.

MR. BOBZIEN: Let me just reply to three of the items that you mentioned. First of all, let me answer your question as to whether or not your are a subject or target of the investigation by stating that, no, you are not a subject or target of the investigation.

You are being interviewed as one who has made

You are being interviewed as one who has made allegations of misconduct against Department of Justice employees. You are being interviewed today in your capacity as a witness.

Your request to be represented by an attorney at this particular interview is denied. We have no ability to provide an attorney for you, and it would be inappropriate for us to permit an attorney in this particular context to be present because of the 6(d) material that will be discussed, and also because of the privacy considerations of those employees that willbe mentioned and discussed in the context of the investigationand this interview.

We note your request for protection from reprisal, and on behalf of the Office I assure you that, insofar as any personnel actions taken by the Antitrust Division to date or in the future can be characterized as retaliation for you bringing these allegations of misconduct forward to this Office, they will be addressed by this Office.

JA 175

MR. TWIST: Thank you.

* * *

JA 176

MR. THOMAS: Which memorandum is this?

MR. TWIST: This is the September 18, 1984, memo from Helmut Furth to J. Paul McGrath.

Then in the last page of CRT-11, Helmut Furth to McGrath, he says: "I suggest for your consideration that it would be desirable to invite counsel for Newhouse and Cole to make a presentation to us of the facts, as they perceive them, before proceeding to call a grand jury."

I think that's very questionable judgment.

MR. BOBZIEN: Let me ask you this, Russell. Despite the fact that it might be, as you say questionable judgment, is this something that you are aware of that is routinely done in the Antitrust Division?

MR. TWIST: I do not know. It's the kind of thing that-- add to that the fact that we're talking about lawyers from Sullivan & Cromwell coming in, which is your own firm. I think that taints it a little bit.

But in any event, I don't know that. What I do know is that there has been a course of conduct in

JA 177

this investigation to derail it and impede it, so that one might quibble with any one point, but I'm willing to give up any one or two points or three or four points. There are so any of them, they are all consistent with one direction. To minimize the evidence, to immunize Cole and Maloney, and to not obtain evidence that you should be obtaining.

They never deviate from that pattern.

* * *

JA 178

And the intent is not to get all the evidence, to minimize the evidence that you have, and to immunize the targets. And there is so much of that that it is inescapable that it was improper. And I feel so strongly about that that I really question not having turned it over to Judge Aldrich before she made her final decision and before that went to the Sixth Circuit, because now the United States is in the very embarrassing position of having what I consider a record that has been a fraud on the court at the district court level that's now being reviewed at an appellate level, that is liable to make bad law and harm this case, because they don't have the facts.

And that withholding of evidence is a crime, because it was intentional. So we have an ongoing obstruction that has not been corrected with the courts, and I believe that there is an ethical duty of all of us that believe this to inform the court.

And on October 1, I requested Douglas Ginsburg to inform the court of a possible obstruction of justice, and the reason we said that at the time was, in the Antitrust Division's memos, even when we feel absolutely about something, we say possible, based on the concept that only judges and juries make ultimate determinations of whether there has been a violation of law.

JA 179

But in fact, Marilyn and I at the time we wrote our memos believed that there had been a violation.

John Weedon took out all mention of lawyers in that thing, in the motion to compel which was filed, so the court had no ability to judge their involvement, had no ability to judge what type of involvement they had, had no

ability to judge the quantity and quality of their involvement, and thus made rulings on opinion work product which are very, very serious to this investigation.

It's that kind of thing which should be corrected, and which Mr. Ginsburg has been unwilling to do, which is consistent with the things he has been willing to do, which indicate kind of that he doesn't want this investigated too thoroughly and doesn't want it brought forward, which some people characterize as a cover-up.

I am of the opinion that if Ann Aldrich saw the Bobula-Twist Exhibit B that she would be extremely upset, livid, because you can have– by withholding evidence, you can do great damage to a decision maker, and you can get bad decisions made by courts because they don't have the evidence they should have just as

JA 180

much as you can get bad decisions from courts by giving them fraudulent evidence.

The type– it's misrepresentation of the weight of the evidence. It's misrepresentation if you limit it, just as much as if you make a fraudulent statement about it, and it's a very serious matter. And cutting back on Exhibit B was intentional and was participated in by Rick Rule. But we will get back to that.

And if they are so confident that there was nothing that went wrong, why are they so unwilling to disclose it to the court?

In that regard– and this is preaching again and I recognize

it as that--the United States Department of Justice to the three of us is merely a client. It's a special kind of client, but it is a client.

Lawyers have obligations to the federal courts which are different than their obligations to clients. And those of us who are admitted to the federal courts have an obligation to follow the Code of Professional Responsibility as our role as officers of the court, our role to the court, not the role to our client.

You cannot have--the executive branch of the Government say it's improper for lawyers to

follow the required regulations of another branch of government. I mean, you just can't do that. So the Code of Professional Responsibility is adopted by the federal courts as their rules for their officers, but in fact the Department of Justice has, as required, rules that we follow, the Code of Professional Responsibility.

And that code says that a lawyer aware of a fraud on the court is supposed to inform the court, and I believe there has been a fraud on the court. So I believe we're all in jeopardy at this point by not telling them that, because if you or I were head of the Antitrust Division, if we really believed that Marilyn Bobula and Russell Twist were bad lawyers or didn't see things properly, we would have nothing to fear about letting that material go to the court and let them embarrass themselves.

You know, if we're such bad lawyers, let the court look

You know, if we're such bad lawyers, let the court look at us and shame us and chastise us, and then the Department can do what they want. But to not let us show the court, when we have an obligation to do that, and to punish us at the same time for doing it, and not doing the request as they see it, is not the way we're supposed to be participating with the federal courts of the United States.

JA 182

And should that ever be reviewed, I think they will hold it badly against the lawyers, because I remember the whole discussion during Watergate of all those old grey-haired lawyers was, why didn't those young lawyers stand up and do something, why are they just playing tag and going along?

JA 189

cc: Twist, Bobula
David P. Bobzien (OPR)

CRTwist:ce/207

Subject: Grievance

June 23, 1986

To
Douglas H. Ginsburg
Assistant Attorney General
Antitrust Division

From
Charles Russell Twist
Attorney
Great Lakes Office

This memorandum constitutes a grievance filed to assure that all performance evaluations of my work and personnel decisions affecting me are made only be individuals who will be fair and objective. The central issue presented by this grievance is a simple, but critical one: whether an employee who has reported the criminal misconduct of some of his supervisors should be assigned to continue to report to those same supervisors, especially when those supervisors have been proven, in the past, to be retaliatory, and dishonest about the work of employees.

In support of this grievance, I include as Attachment One a copy of my June 3, 1986 Request for Reconsideration of Denial of Within-Grade Pay Increase, with Attachments A through R. I also specifically incorporate herein, by reference, the following documents and tape recordings, which have been submitted separately or are available to the Antitrust Division:

(1) My October 17, 1985 Counterevaluation for Promotion to GS-15, with Attachments A through G, and related memoranda;
(2) My memoranda filed in connection with my appeal of my performance appraisal for the period July 1, 1984 through June 30, 1985, including my October 1, 1985 Comprehensive Statement, with Attachments A through M, my November 20, 1985 Final Statement, with Attachments N through DD, and my February 5, 1986 Final Rebuttal with Attachments EE through II;

(3) The April 15, 1985 and December 3, 1985 Consolidated Grievances, with Enclosures and Attachments, filed by

Marilyn A. Bobula, including all documents submitted by Ms. Bobula to the Grievance Examiner and the tapes of the April 14 through 16, 1986 Grievance Hearing;

(4) The October 22, 1985 Counterevaluation (for Promotion to GS-15) and Renewal of April Grievance Requests, with Attachments A through J, filed by Ms. Bobula, and related memoranda;

(5) The September 16, 1985, November 5, 1985, and February 18/19, 1986 memoranda of Ms. Bobula, with Attachments A through BB, appealing her performance appraisal for the period July 1, 1984 through June 30, 1985;

(6) The December 24, 1985 Request for Reconsideration of Denial of Within-Grade Pay Increase, from Ms. Bobula to Douglas H. Ginsburg;

(7) The October 18, 1985 and February 15, 1986 memoranda of Althea W. Dortch, with Attachments, appealing her performance appraisal;

(8) The May 8, 1986 memorandum of Ms. Dortch requesting reconsideration of the denial of her with-grade pay increase; and

(9) The August 12, 1982 and December 12, 1982 memoranda of Cheryl Allen, with Attachments, appealing her performance appraisal.

This grievance memorandum, along with the above-referencedand incorporated documents and tapes ("the record"), amply proves that some of my present supervisors have not been fair and objective regarding me or my work; rather, they have misused the appraisal, promotion, and other administrative processes for retaliatory purposes and to cover-up an obstruction of justice in the Press/Plain Dealer grand jury investigation.

The record persuasively demonstrates that John A. Weedon,

Chief of the Great Lakes Office, has repeatedly made intentionally false statements about my performance and has attempted to manufacture fault where none exists. Moreover, Mr. Weedon's abuse of authority and harassment have continued over a long period of time and are, in fact, escalating. He has involved David F. Hils, Assistant Chief, in the misconduct.

JA 191

The record also reveals that Mr. Weedon's improper conduct toward me is entirely consistent with a pattern of retaliatory behavior engaged in by him (and others at his direction) against several employees.1_/

1/ A chronology of Mr. Weedon's pattern of retaliatory conduct toward me and three other employees can be found at page 7 through 18 of my June 3, 1986 Request for Reconsideration of Denial of Within-Grade Pay Increase, with Attachments A through R, and in the tapes of Ms. Bobula's April 14-16, 1986 Grievance Hearing. The former document is Attachment One to this grievance memorandum.

Furthermore, there is every indication that Mr. Weedon will continue to be punitive in his work assignments, performance ratings, promotion recommendations and other administrative decisions affecting me and will continue his day-to-day harassment.

The present situation cannot be allowed to remain unchanged. I should not be forced to repeatedly prove

Mr. Weedon's dishonesty and retaliatory nature, when there is already cumulative evidence showing these facts and the true situation in the Great Lakes Office. Now should Mr. Weedon be permitted to cause perpetual involvement by Washington reviewers in unending proceedings.

Therefore, I respectfully request the relief set forth in Part III, below.

II

BACKGROUND

At all relevant times, John A. Weedon has been the Chief of the Great Lakes Office of the Antitrust Division and the lead attorney on the Press/Plain Dealer grand jury investigation. Marilyn Bobula has been the second attorney on the investigation
and I was the third attorney until June 21, 1985.

As the investigation progressed, Ms. Bobula and I became aware that it was being intentionally impeded by Mr. Weedon and
others. In Spring 1985, I spoke to the law clerk for the empaneling judge and asked what my duties were, as an officer of the court, if I thought there was an obstruction of justice. I told the clerk that the other staff attorney also believed that the investigation was being obstructed. In

June 1985, I informed the federal district court for the Northern District of Ohio that the Press/Plain Dealer grand jury investigation was being impeded by employees of the U.S. Department of Justice.

In October 1985, the Office of Professional Responsibility of the U.S. Department of Justice ("OPR") began an investigation into Mr. Weedon's handling of the Press/Plain Dealer grand jury investigation. The OPR investigation is still in progress and Ms. Bobula and I are important witnesses/complainants in that investigation.

Ms. Bobula and I have provided documentary and testimonial evidence to the OPR concerning Mr. Weedon's participation in the obstruction of justice. This evidence clearly implicated others in the Antitrust Division as well.

During the eight months of OPR's investigation, Mr. Weedon has been permitted to remain both the Chief of the Great Lakes Office and the lead lawyer on the Press/Plain Dealer grand jury investigation. I am still assigned to the Great Lakes Office and, accordingly, Mr. Weedon remains my immediate supervisor.

Mr. Weedon has engaged in a series of retaliatory acts against Ms. Bobula and me since he learned that we reported his criminal misconduct. These retaliatory acts have included false performance evaluations, recommendations for denial of promotions, and other adverse personnel actions, as well as day-to-day harassment.

Mr. Weedon also continues to retaliate against my co-workers who have supported me. Moreover, he has engaged Mr. Hils to participate in this harassment.

For example, after Mr. Weedon lost appeals filed by Ms. Bobula and Althea W. Dortch, a paralegal in the Office, he enlisted the assistance of Mr. Hils to further his unjust treatment of Ms. Bobula and Ms. Dortch. Mr. Hils prepared false memoranda regarding the performance of these two employees and, in an effort to create a hostile working environment, he has joined in the day-to-day harassment of them.

Mr. Weedon attempts to make it appear that Mr. Hils, his subordinate, is exercising independent judgment; but, such a ploy is transparent and futile to any fair-minded reviewer.

Not only has Mr. Weedon refused to stop his harassing conduct, but he has intensified it to an intolerable degree.

JA 193

This intensified harassment has coincided with his interview with the OPR and with the Grievance Hearing conducted by the United States Attorney for the Middle District of Tennessee for Ms. Bobula.

In addition to using these adverse personnel actions to retaliate, Mr. Weedon has another purpose. He attempts to portray his entire Cleveland Press/Plain Dealer grand jury staff as less than satisfactory in order to diminish our credibility when we explain how he obstructed the investigation.

As the record proves, every instance where Mr. Weedon criticized our work on the investigation was actually his attempt to cover-up his own improper handling of that same

area of the investigation. 2/ The record repeatedly proves that his criticisms are actually attempted defenses and excuses for why he conducted the investigation as he did.

2/ For example, his criticism of the Bobula/Twist Motion to Compel and Exhibit B was actually a cover-up for his deliberately filing a seriously deficient motion package. And his unjustified attacks on the affidavits prepared by Ms. Bobula and me were to cover up his decision to improperly withhold evidence from the court.

Therefore, these unjustified attacks on Ms. Bobula and me are not only prohibited retaliatory actions, but also are additional violations of law, specifically 18 U.S.C. s 4, Misprision. Furthermore, those who assist Mr. Weedon and participate in unfair and untrue criticism of our work are also attempting to cover-up the obstruction of justice and are also violating 18 U.S.C. s 4.

On October 18, 1985, Mr. Weedon gave me a 90-day notice that he was considering recommending that I be fired. On May 21, 1986, Mr. Weedon gave me a second 90-day notice and instituted weekly meetings to "help me" with my allegedly unsatisfactory performance.

Mr. Weedon does not use these Friday morning meetings to help my performance in any respect. Mr. Weedon has now held four of these meetings and, with the exception of the last brief meeting, he has used the three previous ones to harass and verbally abuse me. He is generally hostile and

hypercritical, during the meetings. He attempts to manufacture fault with my performance, when in fact my work has been

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excellent, especially when compared with the work of other attorneys.3/

Mr. Weedon directed Mr. Hils to conduct the Friday morning of these meetings; and, he too, has utilized the meeting to harass me.4/

3/ For example, Mr. Weedon has requested all preliminary drafts I prepare of my work, including those generated before the draft I normally turn in to him. Thus, he wants to criticize my work before I have even finished it. As in the past, Mr. Weedon wants to falsely claim credit for producing the final product.

4/ For example, Mr. Hils persisted in asking me the same question six times, thus, forcing me to repeat the same answer over and over for a full half hour.

Clearly, Mr. Weedon and Mr. Hils do not review my work in the same fashion as they review the work of other attorneys in the Office. Thus, they discriminate by applying different standards to different attorneys.

The Friday morning meetings are a charade and are designed and calculated to be punitive and abusive. This retaliatory conduct is a prohibited personnel practice and the meetings are additional violations of 18 U.S.C. s 4.

It is manifestly unfair that the individuals I have reported have been permitted to engage in unlawful retaliation. Even as of this date, the Antitrust Division has ignored the substantial evidence in its possession and has taken no steps to stop Mr. Weedon. He remains in a position to continue to make false statements about my work and to make retaliatory adverse recommendations based upon these false statements.

III

RELIEF SOUGHT

Because of their obvious conflict of interests, and their inability to be fair and objective, persons I have reported to the OPR, or who are implicated by the evidence before the OPR, should not be permitted to make any personnel decisions, including performance evaluations, affecting me. (Similar relief should be provided to Marilyn A. Bobula, who is in the same situation as I.)

JA 195

Parts I and II, above Attachment one, and the above-referenced and incorporated documents and tapes demonstrate that the present untenable situation cannot

be permitted to remain unchanged. Clearly, an employee who has reported the criminal misconduct of some of his supervisors should not be assigned to continue to report to those same supervisors.

The problems inherent in such an assignment are exacerbated when, as here, the immediate supervisor has been proven to be retaliatory and to prepare false memoranda and evaluations not only about my work, but also about the work of other employees.
Mr. Weedon's past conduct shows thai he wants to have me fired for reporting him and that he will resort to dishonesty and improper means to try to accomplish this.

It is, therefore, reasonable to conclude that Mr. Weedon will continue to abuse his authority, if given the opportunity, and will persist in coercing or encouraging his subordinates to participate in prohibited personnel practices in order to assist him. 5/ Consequently, this grievance is filed to obtain the following relief:

5/ More seriously, as explained in Part II, above, much of this improper conduct by Mr. Weedon and others amounts to additional violations of 18 U.S.C. s4, Misprision.

1. That I not receive a formal performance rating for the period July 1, 1985 through June 30, 1986.

This relief is appropriate for three reasons. First, there is no resolution yet for my performance rating

for the period July 1, 1984 through June 30, 1985. Second, my present Rating Official, Mr. Weedon, has been proven to have deliberately prepared false appraisals of my work in the past. There is no other supervisor who can be substituted as my Rating Official, because no other supervisor, in Cleveland or in Washington, is sufficiently familiar with the major work I have performed during the rating period. Third, my present Rating Official, Mr. Weedon, and Reviewing Official, Mr. Widmar, should recuse themselves because of the circumstances explained in Part II, above.

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2. That I be transferred to a litigating position satisfactory to me, in the Department of Justice, preferably outside of the Antitrust Division, either in Washington, D.C. or in a city acceptable to my family and me. (My approval of the transfer location is mandatory to avoid a punitive transfer, which would be highly improper.) 6/

This relief is necessary if Mr. Weedon and Mr. Hils remain in charge of the Great Lakes Office. Otherwise, I will continue to be the victim of retaliatory personnel actions, punitive work assignments, and daily harassment.

3. That the Friday morning meetings ordered by Mr. Weedon's May 21, 1986 90-day notice, be discontinued. At the very least, the holding of these meetings should be stayed, pending the resolution of this grievance.

This relief is justified because of the abusive

nature of the meetings, described in Part II, above, and the likelihood that these meetings constitute additional prohibited personnel practices and violations of 18 U.S.C. s4.

4. That I be free from retaliation in any form, and, if I am not transferred out of the Great Lakes Office, that I not be assigned to work with Mr. Hils or William J. Oberdick.

This relief is necessary because it has been proven that Mr. Hils and Mr. Oberdick have prepared false statements about the work of other employees to assist Mr. Weedon in his retaliatory conduct toward those employees. Moreover, both Mr. Hils and Mr. Oberdick have previously participated in Mr. Weedon's harassment of me. (Other attorney's requests not to work under Mr. Oberdick have been granted.)

6/ If I am transferred within the Antitrust Division, it should be to a section where I will be treated fairly and not to an office where there are known problems with the management,as was the situation when I was transferred to the Great Lakes Office.

IV

CONCLUSION

This grievance raises a simple, yet critical issue: Whether an employee who has reported the criminal misconduct of some of his supervisors should be assigned to continue to report to those same supervisors, especially when those supervisors have been proven, in the past, to be retaliatory and dishonest about the work of their employees.

Because of their obvious conflict of interests, and their inability to be fair and objective, persons I have reported to the OPR, or who are implicated by the evidence before the OPR,
should not be permitted to make any personnel decisions, including performance evaluations, affecting me. (Similar relief should be provided to Marilyn A. Bobula, who is in the same situation as I.)
Attachment/Enclosures

JA 199.

Antitrust Division

Great Lakes Office
995 Celebrezze
Federal Building

June 25, 1986

Honorable Douglas H. Ginsburg
Assistant Attorney General

Antitrust Division
U.S. Department of Justice
Room 3107 Main Justice Building
Washington, D.C. 20530

Dear Mr. Ginsburg:

The conduct of Charles Russell Twist has become so disrespectful, insubordinate, and harassing that I propose to remove him from his position as an attorney in the Great Lakes Office as his services are no longer desired. John A. Weedon has gone on annual leave until July 7, 1986, and I am responsible for this Office until that time.

On May 21, 1986, Mr. Weedon issued a memorandum to Mr. Twist to provide him with 90 days to improve his performance. In that memorandum, Mr. Weedon required Mr. Twist to meet with him every Friday morning to discuss his recent work activities for the purpose of assisting him to improve his performance. That memorandum requires Mr. Twist to provideat each weekly meeting copies of all written work, includingdrafts, that he produced during the preceding seven days. The memorandum specifies that, in the absence of Mr. Weedon, Mr.Twist is to meet every Friday with me.

Mr. Weedon's memorandum of May 21, 1986, described an earlier instance of Mr. Twist's disrespectful, insubordinate, and harassing conduct. Despite the fact that Mr. Twist was admonished about this type of conduct, he has continued to be disrespectful, insubordinate, and harassing.
A. June 13 and 16, 1986.

A recent group of incidents occurred on June 13 and 16, 1986. On the morning of Friday, June 13, 1986, Mr. Weedon

informed Mr. Twist that he was assigning Mr. Twist to the investigation of concrete pipe and that, I would give Mr. Twist a copy of the Federal Trade Commission's memoranda concerning this investigation later that day. About 3:00 p.m. that day,I gave Mr. Twist his copy of the Federal Trade Commission's memoranda about concrete pipe. I said that Mr. Weedon told me that he had informed Mr. Twist of his assignment to this investigation. I told Mr. Twist that the staff would consist of Mr. Twist, William J. Oberdick, Theresa M. Majkrzak, and me. I told him we would meet after lunch on Monday, June 16, 1986, to discuss how to proceed with this investigation.

A few minutes later, Mr. Twist came to see me. He asked me who would be in charge of this investigation. I told him I would be in charge. He then said he does not want to be assigned to another matter with Mr. Oberdick. He said he would think about it over the weekend. I responded that he should think about it over the weekend and let Mr. Weedon know on Monday, June 16, 1986.

On the morning of June 16, 1986, Mr. Twist did not discuss this matter with me and he apparently did not discuss it with Mr. Weedon. About 2:05 p.m., I looked for Mr. Twist in his office to ask whether he would be available for a staff meeting with Mr. Weedon to discuss the concrete pipe investigation. He was not in his office. I asked the receptionist, Eve Alexander, whether she knew his whereabouts. She said he was out to lunch and she expected him back soon. I told her to ask him to see me when he came in. She said she would.

About 2:30 p.m., since I had not yet seen Mr. Twist, I went to his office again and found him and Marilyn Bobula eating lunch at his desk. I asked Mr. Twist whether he could join in a staff meeting with Mr. Weedon to discuss the concrete pipe

investigation. He responded that, before such a meeting, he should talk to Mr. Weedon about it because that was the matter that Mr. Twist did not want to be assigned to. I said that he should talk to Mr. Weedon.

I left Mr. Twist's office and returned to the vicinity of Mr. Weedon's office. About 2:35 p.m., Mr. Twist appeared and we both went into Mr. Weedon's office.

Mr Twist said his preference was not to work on the staff assigned to concrete pipe. Mr. Weedon asked him for his reasons. Mr. Twist said he does not want to work with people who lie. Mr. Twist said Miss Majrzak, Mr. Oberdick, and I have lied about Althea W. Dortch (a paralegal in this Office who has a personnel matter pending), and he does not want to work with these people. Mr. Weedon told Mr. Twist that Mr. Twist is not in a position to judge Miss Dortch.

Mr. Twist added that he has worked two years on another investigation with Mr. Oberdick and Miss Majkrzak and he thinks that is long enough. He said he wants a change. He also said

that there are other matters to which he could be assigned, such as Barbara Brown's waste management investigation. Mr. Twist said that any good manager would shift him to work with other people. Referring to his assignment to the concrete pipe investigation, Mr. Twist emphatically said, "I won't do it." Then he said with equal firmness, "I'll appeal it to Mr. Widmar."

Several times during the conversation, Mr. Weedon asked

Mr. Twist whether he had any other reasons for seeking to be removed from this assignment. The only reasons he stated during this meeting are those recounted in the preceding two paragraphs. Mr. Weedon told Mr. Twist that Mr. Weedon would discuss this assignment with me. The discussion ended, and Mr. Twist left the room.

Immediately thereafter, Mr Weedon and I discussed the staffing needs on concrete pipe and other new mattes in the office, including waste management, and still another investigation involving flowers. We determined that these other two matters were adequately staffed whereas concrete pipe needed a lot of work and needed Mr. Twist's time working on it. Later that day, Mr. Weedon discussed the situation with Mr. Widmar. Mr. Widmar said he would not involve himself in staffing matters and that staffing is up to Mr. Weedon.

About 4:45, Mr. Weedon and I met again with Mr. Twist. Mr. Weedon said that he had considered Mr. Twist's reasons for wanting to be changed from the concrete pipe staff and that these reasons were not sufficient. Mr. Weedon asked whether there were any other reasons and Mr. Twist said no. Mr. Twist then said he will add this assignment to the grievance he is preparing. Mr. Twist was highly critical of Mr. Weedon's management decision to keep Mr. Twist assigned to work on the concrete pipe investigation. At one point, Mr. Twist said he thought this was bad management by Mr. Weedon. In another remark, Mr. Twist said this decision reflected badly on Mr. Weedon's work. To relieve Mr. Twist's concern about working with Mr. Oberdick, Mr. Weedon told Mr. Twist that, on the concrete pipe investigation, Mr. Twist would be working primarily under my supervision, not Mr. Oberdick's. Mr. Twist said that in his grievance he would explain why he does not want to work with me either. Mr. Twist complained that Mr.

Weedon would not accede to reasonable requests of his staff, inasmuch, as Mr. Weedon would not accede to Mr. Twist's request to be changed from the concrete pipe staff. Mr. Weedon said that that staff is where Mr. Twist is needed most, and he is not needed on other staffs. Since Mr. Twist had continued to argue against his assignment throughout the meeting, Mr. Weedon again told Mr. Twist that he will still assigned to this investigation. (On a later date when the staff met to discuss the concrete pipe investigation, Mr. Twist did, in fact, participate in the meeting and the discussion.)

JA202.

These incidents demonstrate Mr. Twist's disrespectful, insubordination, and harassing conduct. Mr. Twist's unfounded accusation of lying was made against me, the Assistant Chief, against Mr. Oberdick, the supervising attorney for the principal investigation to which Mr. Twist is assigned, and against Miss Majkrzak, an attorney who is also assigned to that investigation. Mr. Twist provided no basis for his accusation that I and the other two attorneys had lied, and I know of no basis for it. The three people he has accused of lying about Miss Dortch have made statements that are included in various personnel actions concerning Miss Dortch since July 1, 1984. I have personally checked and re-checked many times the accuracy of the statements contained in those papers, and I have found them to be completely accurate and that these accusations are totally baseless. In addition, most of the events described in those papers are corroborated by documents or by other employees. In all but a few instances, Mr. Twist was not even present during the events described. Mr. Twist's accusation that three attorneys have lied about Miss Dortch is unsupported, disrespectful, and insubordinate.

Further, Mr. Twist was insubordinate when he flatly refused the assignment, firmly saying, "I won't do it." The insubordinate nature of this original refusal is not changed by either his later statement that he would appeal to Mr. Widmar or his still later attendance at a staff meeting to discuss the investigation. It was also disrespectful and insubordinate for Mr. Twist to repeatedly accuse Mr. Weedon of bad management and unwillingness to accede to reasonable requests of his staff.

Finally, Mr. Twist's conduct was harassing and a deliberate attempt to intimidate Mr. Weedon from carrying out his supervisory responsibilities. Although it may be permissible for Mr. Twist to file a grievance and to appeal to Mr. Widmar in appropriate circumstances, his statements in this context were intended to intimidate Mr. Weedon from exercising his authority to make assignments. His statement that he would appeal to Mr. Widmar followed shortly upon his flat refusal of the assignment and threatened that Mr. Weedon's authority would be undermined by Mr. Twist's appeal to Mr. Widmar. Similarly Mr. TWist stated that he would include in his grievance his assignment to this investigation and his reasons why he does not want to work with me. Again, these statements were made in a manner to intimidate and undercut Mr. Weedon's authority rather than placing Mr. Weedon on notice of Mr. Twist's desire to exercise avenues of appeal.

B. JUNE 20, 1986

Another group of incidents occurred on June 20, 1986. Mr. Weedon had begun a period of annual leave on the morning of June 17, 1986. Although he came into the Office for a

particular matter for part of the day on June 18, he was scheduled to be out continuously until the morning of July 7, 1986. Before Mr. Weedon left on leave, he informed Mr. Twist and me that Mr. Twist should meet with me on Friday mornings for the discussions of his work, as was provided in Mr. Weedon's memorandum of May 21, 1986.

About 8:58 a.m. on Friday, June 1986, Mr. Twist came into my office and asked whether I was ready to meet. I told him I was ready and he seated himself. As soon as he sat down, he said that he considered these meetings to be part of a cover-up of a crime and that, if I participated and conducted this meeting, I would be in violation of 18 U.S.C. s4, which he identified as misprision of a felony. When I asked him what crime he was referring to, he said I would be helping to cover up obstruction of justice in the Press/Plain Dealer investigation. He added that I would be guilty not only of misprision of a felony, but I would also be a co-conspirator in the other acts of the other conspiracy, and that he would report my conduct as such.

I told him I would continue with the meeting, and I asked him to proceed in the same manner as he had in his meetings with Mr. Weedon. He said that Mr. Weedon usually asked him questions. I then asked him several questions to obtain his written work from the past week. I said I understood that he was to give me the drafts and other written work he had done during the past week. He did not present any written material to me either in response to this request or at any other time during this meeting despite the explicit requirements stated in Mr. Weedon's memorandum of May 21, 1986 that he provide at the weekly meetings copies of all written work, including drafts,

that he produced during the preceding seven days. He said he had no finished draft yet. He said he is doing a part of the memorandum of evidence on Mr. Oberdick's investigation, but he is still getting more information from Mr. Oberdick to include in his draft. Mr. Twist asked why I wanted his drafts. I told him I understood he was to submit drafts so I could review the work he was doing. After I asked several questions to try to determine what sections of the memorandum of evidence he was assigned to write and what he had, in fact, written, Mr. Twist interrupted our discussion to complain about my taking notes of our discussion. In an accusatory tone of voice, he said it appeared to him that I was "gathering information." I said I was gathering information because I understood that the purpose of the meeting was to review his work during the week to assist him to improve the performance standard of his job.

He addressed me sternly as "Mr. Hils", spoke in a hostile tone of voice, and accused me of improper conduct. I told him I considered his statement very offensive and I said that he meeting was concluded. He said that I had asked for things

that were improper and that he would add this to his grievance. He also pointed out that I, not he, had concluded the meeting.

I replied that, by concluding the meeting, I would not request him to say any more, but that he could say anything he wished to say. He said that he was happy to answer any questions bout his work, that he was not refusing to answer questions about his work, but that he thought the whole thing was a criminal violation of the law. I asked him whether there

was some way I could ask him about his work without violating the law. He said that it was harassing to ask for his writing because no one else on the staff was asked for it. He said he thought that everything about this meeting in the way it was structured was a criminal violation of the law and a prohibited personnel practice. He said it was a prohibited personnel practice for which I should be punished and that he would add me to the grievance that he expected to have completed that day so it would be aired at a high level with Mr. Ginsburg.

I asked him whether there was some context in which he felt it would not be improper for me to ask him about his work. He responded that I was guilty of two crimes--the initial crime and the cover-up, and that I was persisting in it by asking the same question. He said this made the third time I had asked him the same question and that I was harassing him by asking the same question over and over.

I said I was trying to determine whether he felt I could ask him any question about his work. He said he would answer for the fourth time that this was a prohibited personnel practice. He then said it was clear that I could ask any work-related question I considered appropriate. He said "I am happy to answer any of your questions even in this meeting, but these meetings are prohibited personnel practices and a violation of the law." I asked whether there was any context in which I could ask him questions without violating the law and prohibited personnel practices. He said the context was not this meeting, but he did not provide any positive suggestion of an appropriate context.

I asked whether, if I came to his office and asked him the same questions, that would not be a prohibited personnel practice. As he took notes, he said it would be obvious

to anyone who read it, from the course of this questioning, that I was engaging in harassment. He said, "I am not refusing to answer your questions." He then looked at his watch and said we have "now spent 29 minutes" in this meeting. He said he was not refusing to answer questions. He said these meetings are a violation of law and so the meetings and questions within them are improper and criminal conduct.

JA 205

I then told him that there was no point in proceeding further and that I was not going to ask him any more questions at that time. I asked him whether there was anything else he wanted to say to me. He said, "No," and he left my office.

Throughout this meeting, Mr. Twist made notes and repeatedly addressed me sternly as "Mr. Hils." (Outside of this meeting, his normal manner of addressing me is "David.") His statement near the end of the discussion that it would be obvious to anyone who reads it that I was engaging in harassment was a clear attempt to intimidate me from carrying out my duties. His stern use of "Mr. Hils" to address me was usually in one of his repeated threats that I was violating the law and was engaging in prohibited personnel practices. As a result, he turned a form of address that is normally a sign of respect into a sign of disrespect, insubordination, and intimidation.

Mr. Twist had no further discussion with me about his written work until about 5:05 p.m. that day when I went into his office. At that time, I told him that I had obtained Mr. Oberdick's latest draft of the memorandum of evidence, but, since Mr. Oberdick did not have Mr. Twist's section, I was asking Mr. Twist to give me his section. Mr. Twist said that

he had not finished making corrections on it; but he went to his brief case and pulled out a copy and handed it to me.

This draft of Mr. Twist's section of the memorandum is marked as "Draft#5/06-20-86." (It is routine for our typists to number and date drafts every time they are returned for re-typing in the word processing pool.) Later that evening when I checked the temporary files maintained in the word processing pool, I found the following earlier drafts of Mr. Twist's section: Draft #1/06-16-86; Draft #2/06-17-86; Draft #3/06-17-86; and Draft #4/06-18-86. These drafts had been completed during the seven days preceding our meeting that morning, but Mr. Twist had failed to produce them as he was required to do by Mr. Weedon's memorandum of May 21, 1986.

The fact that Mr. Twist gave me his Draft #5 when I went to him near the end of the day and requested it does not alleviate his insubordination during the meeting in the morning. Rather, the contrast in his actions of the morning and his actions of the afternoon only serve to emphasize his insubordination. Mr. Twist's willingness in the afternoon to hand over Draft #5 was based on my prefacing my request with the fact that I had already obtained the latest draft of the other parts of the memorandum from Mr. Oberdick. Mr. Twist apparently considered this to be a reasonable request. His refusal in the morning to present Drafts #1-4 was based on his own determination that the action directed by the authority of the Chief in his memorandum and the authority of the Assistant Chief by my oral request was

an improper exercise of authority. Mr. Twist refused to respond to authority but responded only when he made his

own decision of propriety. This is insubordination.

In the morning, Mr. Twist's excuse for not producing his draft was that it was not finished. By definition, however, no draft is finished work. He also complained that no one else was required to produce drafts. No one else, however, was in a position similar to Mr. Twist– that of being given an opportunity period to improve his performance to a satisfactory level. Using this excuse and this complaint to dodge producing his draft undermined my authority to obtain his drafts as expressed in Mr. Weedon's memorandum.

Mr. Twist's repeated accusations that I was violating the law and engaging in prohibited personnel practices were designed to intimidate and threaten me. In his opening remarks at the morning meeting, he threatened me with reporting my supposed "crimes" and attempted to undermine my supervisory authority. When I asked Mr. TWist questions to determine what he had written and I attempted to obtain his written work, he accused me of asking for improper things and he threatened that he would add this to his grievance. Later he said everything about the meeting was a prohibited personnel practice for which I should be punished and he again threatened to add me to his grievance so this would be aired "with Mr. Ginsburg." His empty statements that he was happy to answer any of my questions were promptly followed by repeating his threats that I was violating the law. Even when I attempted to find a way to set his mind at ease by asking him to describe a different setting that he would not feel was objectionable, he refused to describe an appropriate setting and reverted to his accusations that I was violating the law.

Mr. TWist had been warned of his disrespectful, insubordinate, and harassing conduct in Mr. Weedon's memorandum of May 21, 1986. Mr. Twist's continued conduct of this type should not be tolerated. He should be removed as soon as possible from his position as an attorney in the Great Lakes Office.

Sincerely yours,

David F. Hils
Assistant Chief
Great Lakes Office

JA207

U.S. Department of Justice
Antitrust Division
Great Lakes Office
995 Celebrezze Federal
Building

July 8, 1986

Honorable Douglas H. Ginsburg
Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Room 3107 Main Justice Building
Washington, D.C. 20530

Dear Mr. Ginsburg:

Because of additional disrespectful, insubordinate, and harassing conduct by Charles Russell Twist, similar to that which I described in my letter of June 25, 1986, I again request that he be removed from his position as an attorney in the Great Lakes Office.

After my meeting with Mr. Twist on June 20, 1986, our next meeting for the purpose of discussing his work pursuant to Mr. Weedon's memorandum of May 21, 1986, was scheduled for July 3, 1986. About 9:00 a.m. on July 3, Mr. Twist came into my office, and we exchanged greetings. He closed the door and sat down. Before I said anything further, he said sternly, "If all this doesn't stop soon, my lawyer will file an action in the Northern District of Ohio Federal District Court, and you'll be a party personally."

Despite this threat, I proceeded with the meeting. I continued the meeting for about ten minutes, but Mr. Twist challenged my conduct much as he had done on June 20.

I then told him that he had made this meeting so confrontational that I would not ask him any more questions. I asked if there was anything more that he wanted to say. He said there was much more that he wanted to say. He said he was happy to answer any of my questions. He said he was happy to discuss any of his work. He said the meeting was not confrontational. He said I was not trying to help him with his work. He said I was only stopping the meeting to avoid

further violations of the law. He said he would call Washington about my refusal to have the meeting. He said he would call David Bobzien (of the Office of Professional Responsibility) about my refusal to have the meeting. When I determined that he had nothing else to say, the meeting concluded.

JA 208

In this meeting, Mr. Twist continued the disrespectful, insubordinate, and harassing conduct that I described in my letter of June 25, 1986. He started the meeting with the threat that, if "all this doesn't stop soon," I would be named as a party to a lawsuit. This was a direct attempt to undercut my authority to conduct this meeting.

As in our previous meeting, he continued his stern use of "Mr. Hils: to address me, instead of his usual from of address--"David". Right after addressing me as "Mr. Hils." he accused me of engaging in a prohibited personnel practice and a violation of the law. Thus, he continued the method he used in the meeting of June 20, 1986--he converted what is normally a form of respectful address into a sign of disrespect, insubordination, and intimidation.

Finally, when I decided to close the meeting, he indicated that this was also improper and he threatened to report my conduct to "Washington" and to "David Bobzien." Whatever his rights of appeal may be, he had no right to threaten me with these actions.

Mr. Twist has attempted to maneuver me into a dilemma. At the start of the meeting on June 20, he claimed that by conducting that meeting, I would be committing two crimes. At the start of the meeting on July 3, he threatened

me with a lawsuit if "all this doesn't stop soon." Despite these unqualified objections to holding these meetings, he threatened near the end of the meeting on July 3 to report my supposed "refusal" to conduct this meeting. Each of these three statements individually attempted to undercut my authority by intimidating me. The three statements in combination, however, attempted to undercut my authority by demonstrating that I would supposedly be in trouble regardless of whether I continued or discontinued the meeting. Mr. Twist's attempt to trap me in a dilemma shows that his insubordination was not the result of an unguarded moment of anger or thoughtlessness but was carefully planned and calculated.

Mr. Twist's disrespectful, insubordinate, and harassing conduct should not be allowed to continue. He should be removed immediately from his position as an attorney in the Great Lakes Office.

Sincerely yours,

David F. Hils
Assistant Chief
Great Lakes Office

JA 209.

U.S. Department of Justice
Antitrust Division
Office of the Deputy
Assistant Attorney General

G-46

Washington, D.C. 20530

TO: C. Russell Twist
Attorney
Cleveland Field Office
Antitrust Division

FROM: Roger B. Andewelt
Deputy Assistant Attorney General
Antitrust Division

RE: Grievance of June 23, 1986

Assistant Attorney General Ginsburg has referred to me your grievance of June 23, 1986, for response as deciding official.

In response to the first item under the heading, "Relief Sought", in your grievance memorandum, I have decided to delay issuance of your performance rating for the period ending June 30, 1986, until August 19, 1986, the end of your second 90-day warning period for improvement performance. Since Mr. Weedon must issue an evaluation of your work at that time, both the rating and evaluation will be issued concurrently. As your supervisor is required by law to appraise your performance, no further delay of your performance rating can be granted.

As to the other items of relief sought in your grievance, I have decided to delay any final decision on these items until the Office of Professional Responsibility (OPR) issues its findings and recommendations. I believe that the issues raised

in your grievance are so closely related to the issues now subject to OPR investigation that OPR's report will serve the same purpose as the report of a "fact-finder" under the Department's grievance procedures. Therefore, I intend to consider OPR's findings before making a decision with regard to the remaining items of relief you seek.

In the interim, until OPR issues its decision, the Friday morning meetings ordered by Mr. Weedon's May 21, 1986, memorandum to you will continue. As Chief of the Office and your supervisor, Mr. Weedon has the authority to hold such meetings, and it is your responsibility to attend them and account for your activities to him. Also, as Chief of the Cleveland Office, Mr. Weedon has the authority to make all decisions regarding staffing assignments in that Office. Therefore, if Mr. Weedon believes your assistance is required on a matter undesirable to you, it is still your responsibility as an employee under his supervision to undertake any assignment he makes.

JA 211

DEPARTMENT OF JUSTICE
ANTITRUST DIVISION

SUPERVISORY MEETING

Re: C. Russell Twist

Room 3107

G-48

Department of Justice

10th and Constitution Avenue, N.W.

Wednesday, July 9, 1986

ASSISTANT ATTORNEY GENERAL GINSBURG: This is a supervisory meeting that I, as Assistant Attorney General, have called, in order to discuss with Russell Twist his recent conduct, as reported to me in letters dated June 8, from David Hils.

Mr. Twist has come in from Cleveland, today--

MR. TWIST: Yes; that;s correct.

ASSISTANT ATTORNEY GENERAL GINSBURG:-- in order to attend this meeting, at my request. In addition, Mr. Hils has come here at my request, and Roger Andewelt, my deputy is with us.

Russell, these letters are very disturbing, and they recount what, to me, seem like a series of events that constitute, really, quite unacceptable behavior for a professional employee in the Department of Justice.

I have asked you to come here today, though, in order to have your response, specifically, to some of Mr. Hils statements about this recent history.

I've asked that we have a court reporter here, in order that there by no ambiguity about what your responses have been, and in order to provide you, after this meeting,

with a record of what's been said, so that you may, if you like, then choose to supplement your responses in a way that you deem appropriate.

Now, I believe that Mr. Hils gave you copies of these letters, is that correct?

MR. TWIST: I was given the June 25 letter yesterday, at about eleven o'clock, and I was given the July 8 letter at 5:20 yesterday.

ASSISTANT ATTORNEY GENERAL GINSBURG: Those letters related to various meetings that occurred on June 23, June 16, and June 20, in case of the June 25 letter. And in the case of the July 8 meeting, deal with a meeting that occurred on July 3rd. Now have you read the letters since receiving them yesterday?

MR. TWIST; Yes. Could I make some--well, yes, I've read the letters. Go ahead.

ASSISTANT ATTORNEY GENERAL GINSBURG: All right. Well, I would like to ask you a series of questions about the statements made in the letters, and have you response to them, and if you want to preface that with something.

MR. TWIST: I do, sir. I'd appreciate the opportunity.

JA 215.

ASSISTANT ATTORNEY GENERAL GINSBURG: Go right ahead.

MR. TWIST: First of all, yesterday, when I was called by Ralph Justice at approximately 10:30, Mr. Justice said the purpose of this meeting was to decide whether I should be removed as an employee of the Antitrust Division, and at that point, I asked him--I asked if I could have counsel present, and he said no, I could not. And I said that I wanted counsel present, and he said that he would check, and he later called back with someone in the Civil Division, and said that I did not have a right to have counsel present.

I have consulted with my attorneys, and my attorney believe that I am in fact--if this meeting is to in fact consider my removal, I am entitled to an attorney. So, I request an attorney, if that's the purpose of this meeting, and, if you deny that, then I would appreciate it if you would order me to proceed, so that we would at least have that understanding.

ASSISTANT ATTORNEY GENERAL GINSBURG: The purpose of the meeting is to determine the facts relating to your recent conduct in your position, and, on the basis of those facts, for me to make a recommendation to the Department

JA 216

concerning any appropriate action, which could include your

dismissal from the Department. It's my understanding of the relevant regulations, that you are not in fact entitled to have an attorney at this supervisory meeting, but would have, if there were adverse action taken against you, certain procedural rights, including a presentation, of course, in that event.

MR. TWIST: Well, our view would be that this in fact is part of your process of considering my termination, and that because it deals with that, that I do have a right to counsel. So I am proceeding with this, and the fact that I have been denied the counsel that I seek.

ASSISTANT ATTORNEY GENERAL GINSBURG: I understand that you were prepared to have counsel here, and that I have no obligation to allow that, and I've decided not to do so.

MR. TWIST: The other comments that I would like to make, is that because I was told on July 8, 1986, that I did not have the opportunity to prepare as well for this meeting as I would have preferred.

And I also did not have the opportunity to talk with my lawyers, and advise them, as much as would have been

appropriate, and I would have liked. I did not get Mr. Hils' June 25 letter until approximately 11:00 o'clock yesterday, and I did not receive Mr. Hils' July 8 letter until exactly 5:20 on July 8th.

This gave me insufficient time to study the letters and to consult, adequately, with my counsel. It was extremely short notice.

ASSISTANT ATTORNEY GENERAL GINSBURG: Well, I can appreciate your perspective because I received one of these letters on July 7, and the other on July 8, and was out of the country for the two preceding weeks.

Indeed, this meeting was postponed until my return, precisely because it was considered important that I meet with you personally, and I agreed with that decision when I was advised on the telephone, from abroad, that this was pending, that it should not be taken up by the Acting Assistant Attorney General.

At the same time, I regarded it as extremely important, particularly after I was able to read the letters, that no time be lost, whatever, because if the allegations as presented in the Hils' letter are correct, then your conduct in the Great Lakes Office may simply be too disruptive to

postpone consideration of this action for any significant period of time than was necessary for me to return to the country. Now, that said, can we proceed?

MR. TWIST: Yes. I'd like to discuss my grievance a moment, before I go further, because I think that with all courts, it's appropriate to discuss jurisdictional issues and procedural issues before one goes further.

ASSISTANT ATTORNEY GENERAL GINSBURG: By your grievance, you're referring to the grievance you've already filed?

MR. TWIST: Yes. My June 23rd grievance.

ASSISTANT ATTORNEY GENERAL GINSBURG: All right. Well, I'm not in a position to discuss that, and am not really familiar with the contents of it.

MR. TWIST: I need to make some--

ASSISTANT ATTORNEY GENERAL GINSBURG: I have called this meeting to discuss the allegations reflected in these two letters, and anything else should be handled in whatever the normal procedures for its handling are.

MR. TWIST: I need to make a few comments about the grievance, though, before I proceed. DOJ-1771 makes it clear, that the decisionmaker in a grievance must be

JA 218.

capable of providing the relief sought. Now clearly, Roger Andewelt does not have the authority--I think--to place me in other parts of the Department of Justice, outside of the Antitrust Division. Therefore, I have to lodge an objection to Mr. Andewelt's being the decisionmaker in that grievance.

ASSISTANT ATTORNEY GENERAL GINSBURG: Well, this just isn't the place to lodge such objections.

MR. TWIST: Yes, it is.

ASSISTANT ATTORNEY GENERAL GINSBURG: I think since–

MR. TWIST: No, the grievance is a basic part of this whole thing, and I need to get a few more ideas out.

ASSISTANT ATTORNEY GENERAL GINSBURG: Well, I'm afraid that in my view, the grievance is not related to the answers to these questions, and to my determination of what to do, once I have your answers to these questions.

I have a limited amount of time, and I would like to devote it entirely, or, at least until they're exhausted, to your answers to these questions.

MR. TWIST: Well, I can understand your position but the grievance specifically deals with the very thing that

we're going on now, because as I reported to the Office of Professional Responsibility, I was told by Mr. Weedon, that Mr. Weedon, and Mr. Hils went to talk with John Manos, who was the District Court Judge in Cleveland, about my of obstruction of justice in the DELETED BY GOVERNMENT matter. And I believe in fact that that is correct, that Mr. Hils was with Mr. Weedon, with John Manos, trying to cover up, or continue an obstruction of justice. And therefore, Mr. Hils is a person that I reported to the Office of Professional Responsibility. And I think that for Mr. Hils to be making these allegations, and to be making these recommendations, when in fact I have reported him to the Office of Professional Responsibility for the commission of a very serious crime, is the very issue in my grievance. And my grievance predated

his letter. His letters are retaliation for my filing the grievance. And it goes to the very issue of the grievance.

And were you to proceed with his allegations, you would essentially be deciding the grievance in a way that is not within the procedures for the entire Department of Justice. And I think that there are procedures for the grievance. They require a fact-finder. The OPR

JA 221

cannot substitute for proper fact finding in this matter, and the fact finding is necessary to determine whether Mr. Hils was with Mr. Weedon, with Judge Manos. Whether in fact I did report Mr. Weedon and Mr. Hils to the Office of Professional Responsibility. Whether they're still investigating that matter, and whether, in fact under the Department, whether Mr. Hils should be allowed to make this proceeding happen, after he's been reported for a serious crime.

So I can go into, and would want to go into that at greater length, but, if you proceed with Mr. Hils' letter, you are deciding the grievance without fact finding, and without the things necessary. And my grievance was filed on June 23. I discussed that with Mr. Hils, and his June 25 letter refers constantly to the grievance.

It is really a response to the grievance, and it is an attempt to justify his actions, and to defend his conduct to the very matters put forth in the grievance.

So the grievance ought to come first, and it needs to be--perhaps--well, it needs to be decided by somebody with the appropriate authority to handle the relief sought.

I don't now whether you have the authority

JA 222

to place me in another part of the Department of Justice. If you do, then you do have the authority to handle the grievance. To the extend that you do not have the authority and I didn't know, when I sent it to you--if you do not have the authority, then you should send that grievance, according to the Departmental procedure, above you, to the person that does have that authority.

If you don't do that, and don't have the authority then you are not following the proper procedure for the grievance, which was the basiç issue that we're dealing with, the fact that Mr. Hils has been reported to OPR for part of a crime, and he should not be in the position of making these adverse recommendations against me.

ASSISTANT ATTORNEY GENERAL GINSBURG: Are you through?

MR. TWIST: Well, I want to let you respond to that. I may have some more.

ASSISTANT ATTORNEY GENERAL GINSBURG: I regard the grievance as quite beside the point. I'm more familiar with the background of your situation in the Department over the last several years than I would care to be. I recall that it was in 1984, when I was a Deputy Assistant

JA 223.

Attorney General, that you had serious difficulties with your then supervisor in a section here in Washington, and while consideration was given then, to whether you should be dismissed from the Department, it was my decision, and almost my intercession on your behalf that resulted in your not being discharged, but essentially being given another chance in a new supervisory setting.

And the events since then, including the extraordinary breach of propriety involved when you apparently discussed some grand jury material on a subway car–

MR. TWIST: That I have to–that I didn't–

ASSISTANT ATTORNEY GENERAL GINSBURG: –has indicated to me, that, if anything, the allegations that are before us are nothing more than an unfortunate, if true, confirmation of a pattern of irresponsible behavior, which are not a part of the current decision before me, however. They are bound up in you allegations, and counterallegations, that are contained in any number of, I think, grievances, and appeals, and so on, that are pending at various stages around the Department, and none of which are before me today and none of which I am prepared to deal with today. But against the background, I think it

simply fanciful to accept the proposition that the allegations in the Hils' letters, if true, are nonetheless, somehow beside the point because of the context of your grievance.

It seems to me, that if these allegations are true, that it's your grievance that is quite beside the point for now,

and appropriate forum.

Are you ready now--it is almost two o'clock, and we have been here about fifteen minutes--to address the questions that I want to address?

MR. TWIST: Well, I would need to respond to one thing. I have divulged no grand jury information to any unauthorized person, and all of that is being reviewed by the Office of Professional Responsibility, and I think you have been misinformed, if you believe that, and that perhaps you could talk with them.

ASSISTANT ATTORNEY GENERAL GINSBURG: Well, in fact, I'm awaiting whatever their decision is on what the actual facts are, but that's, as I understand it, one of the allegations that's been made.

MR. TWIST: Right. Given the fact that-- I can say

that--

ASSISTANT ATTORNEY GENERAL GINSBURG: I know you've got a lot that you'd like to say, and I have limited time. Now I would like to deal with my questions and have your answers, and then, time permitting, you can supplement the record, or, in writing, you can supplement the record.

MR. TWIST: I think, if your questions are about my conduct, or view of my termination, I would have to say

that Mr. Hils has mischaracterized those events. For example, I–

ASSISTANT ATTORNEY GENERAL GINSBURG: But instead of asking for your–

MR. TWIST: Now I want to have a lawyer present for this, and I think the grievance is important, so–

ASSISTANT ATTORNEY GENERAL GINSBURG: I would like to have your answers to the questions.

MR. TWIST: –I think if–but if you're short of time, I think we ought to take the opportunity to check on the grievance procedure, because I think it's fundamental to this issue and needs to be resolved first. And I think–

JA 226

ASSISTANT ATTORNEY GENERAL GINSBURG: Russell, I've decided that it does not need to be resolved first. Now I'm going to ask you these questions, and if you don't intend to answer them–

MR. TWIST: I want an attorney present.

ASSISTANT ATTORNEY GENERAL GINSBURG: All right. I've also decided that you will not have an attorney present, and I'm advised that you don't have a right to have an attorney present.

MR. TWIST: My attorney's told me that I have a right.

ASSISTANT ATTORNEY GENERAL GINSBURG: I understand that, and you can choose, at your peril, to refuse to answer my questions today. I would like to put the questions to you. Maybe you'll find that they're sufficiently easy to answer, that you don't find it any difficulty.

MR. TWIST: Based on the fact that you're saying "at my peril," which I interpret to mean you will fire me—

ASSISTANT ATTORNEY GENERAL GINSBURG: If you refuse to answer my questions, I will put you on administrative leave effective immediately.

JA 227

MR. TWIST: Yes. And therefore, I will answer your questions based on that, even though, I think it's under duress.

ASSISTANT ATTORNEY GENERAL GINSBURG: Okay. Here is the first question. Did John Weedon issue you a memorandum in May requiring you to meet with him each Friday in order to review your recent work activities?

MR. TWIST: Yes. He did.

ASSISTANT ATTORNEY GENERAL GINSBURG: Thank you. At the meetings that occurred under that arrangement, were you required to discuss everything you had worked on during each preceding week?

MR. TWIST: Yes.

ASSISTANT ATTORNEY GENERAL GINSBURG: At those meetings, were you also instructed to produce drafts of all you written work for the preceding week?

MR. TWIST: Yes.

ASSISTANT ATTORNEY GENERAL GINSBURG: Did Mr. Weedon direct you, that in his absence, you were to meet with David Hils for the same purpose?

MR. TWIST: Yes.

ASSISTANT ATTORNEY GENERAL GINSBURG: When you came

to meet with Mr. Hils on June 20th, did you begin the meeting by telling him that you thought he was guilty of covering up a crime if he conducted the meeting?

MR. TWIST: Yes, I did, and I believe that to be the case because I think there is an ongoing obstruction of justice in the DELETED BY THE GOVERNMENT matter, that you may not have been informed of, and that Mr. Hils was then the Chief of the office, and that that investigation has continued to be obstructed, and I'm not sure that you're aware of that.

ASSISTANT ATTORNEY GENERAL GINSBURG: I'm aware of your allegations to that effect, and that they're being explored by, I believe, by the Office of Professional Responsibility.

MR. TWIST: But you understand that Mr. Weedon is not doing those things which a reasonably prudent prosecutor would do at this period of time with this grand jury? There are all kinds of things that are very important to do, and he's doing nothing, other than responding, to my understanding, to request for counsel for meetings. So I think that he's not gathering the evidence that's easily obtainable, and that in that sense, I think there is a

continuing crime.

ASSISTANT ATTORNEY GENERAL GINSBURG: Did you also tell him that the June 20th meeting, or any other recent meeting, that he would be violating Section 4 of Title 18 of the U.S.Code, that is to say, misprision of felony?

MR. TWIST: Yes. I did.

ASSISTANT ATTORNEY GENERAL GINSBURG: If he conducted the meeting?

MR. TWIST: Yes, I believe that to be--I told him that, and that's my opinion.

ASSISTANT ATTORNEY GENERAL GINSBURG: and that he would be guilty as a co-conspirator in an obstruction of justice, if he conducted the meeting?

MR. TWIST: I think you have to put that in context. I don't know, at this point, what is an ongoing obstruction, and what is a cover-up. So I'd have to think about that one some more.

It's certainly being obstructed. I'm not altogether sure at what point you separate obstruction from a cover-up.

JA 230

ASSISTANT ATTORNEY GENERAL GINSBURG: But do you recall having told him at this meeting, that if he conducted the meeting, he would be guilty as a co-conspirator in an obstruction of justice?

MR. TWIST: Yes, yes. I don't specifically recall that, but I accept it, if you say that's what I said.

ASSISTANT ATTORNEY GENERAL GINSBURG: And did he ask you at that meeting for all drafts of your written word?

MR. TWIST: No. He did not. He said, "Have you written anything this week?, and I said, "I'm working on a draft." He never asked me to produce drafts.

His specific question was, "Have you written anything this week?" He never asked me to produce drafts.

His specific question was,"Have you written anything this week?, and I said, "I am presently working on the electrical memo of evidence."

ASSISTANT ATTORNEY GENERAL GINSBURG: What about at the meeting of July 3rd? Did he ask you, then to give him your written work for the previous week? That was a Thursday meeting because of the Friday holiday.

MR. TWIST: Yeah. Well, maybe I'm getting these two

meetings confused. I wrote my notes, as I was going

JA 231

through that, which I'll try to find and type up. Given the short notice, I wasn't about to find anything. But everything that Mr. Hils ever asked me for in any of those meetings I gave him.

ASSISTANT ATTORNEY GENERAL GINSBURG: At the time he asked for that?

MR. TWIST: Yes. He asked me, at one point-maybe it was the 20th. He said, "Do you have any drafts?" I said, "I'm working on my sections of the DELETED BY THE GOVERNMENT fact memo, but it's not done yet." And he didn't ask me for that. He asked the question, what did you do? He never specifically asked me. He only asked me, at the end of the day, I think it was the 20th, and I gave it to him because it had come out of a machine. And what I have here is the material that was in the machine; I mean, that I sent to be typed. And it looks roughly like this (indicating.) And the problem with giving Mr. Hils that is, that it was not even a draft; it was typing that was being processed, and there were things that needed to be added. There were citation errors. There were things, that it was not, it was not something you would hand to somebody, and be looked at, because it wasn't done, even as a draft. It was in the

JA 232

process of being--of having these additions put in it, and I told him where it stood, and when he asked for it, at about

5:05 that day, I gave him the stuff that was typed. So I had–

ASSISTANT ATTORNEY GENERAL GINSBURG: What meeting are you referring to? Which day?

MR. TWIST: The 20th, I think.

ASSISTANT ATTORNEY GENERAL GINSBURG: Mr. Hils, is that your understanding of the date?

MR. HILS: Yes. That's my understanding. It was the 20th.

MR. TWIST; Okay, But I never refused to give him anything. He never asked for it, and what I told him was it has having changes made to it.

ASSISTANT ATTORNEY GENERAL GINSBURG: Did he take notes?

MR. TWIST: We both took notes. We both–

ASSISTANT ATTORNEY GENERAL GINSBURG: Did you object to his taking notes at any time?

MR. TWIST: I did not, no, because we were both taking notes, about sentence by sentence. He'd say something and write it down, and I would say something and write it down.

JA 233.

ASSISTANT ATTORNEY GENERAL GINSBURG: And you never complained about his taking notes?

MR. TWIST: No, because we were both doing it.

ASSISTANT ATTORNEY GENERAL GINSBURG: Did you, in the course of this meeting, use what could fairly be described as a stern voice in dealing with Mr. Hils?

MR. TWIST: Well, I don't know what that means but I don't believe that–

ASSISTANT ATTORNEY GENERAL GINSBURG: It's an ordinary sort of characterization.

MR. TWIST: I don't know.

ASSISTANT ATTORNEY GENERAL GINSBURG: You don't think your attitude was stern?

MR. TWIST: Oh, I think my attitude was formal because it was a formal meeting, but there was nothing stern about it. He's objected to the fact that I call him Mr. Hils. I think that's indicative of the pettiness of his complaints. I was reared a formal Republican, and I tend to lead a very formal life, and I do call people in formal situations by their full name. And I think for him to say that I was disrespectful–for example–because I called him Mr. Hils, is not fair. I think as you go around

the Division, most people will call you Mr. Ginsburg, and they don't mean disrespect by that.

ASSISTANT ATTORNEY GENERAL GINSBURG: I understand that
there's something in one of--I recall that there's something in one of the letters that you must be referring to,
but it's not part of any of my questions.

MR. TWIST: It's in both of the letters.

ASSISTANT ATTORNEY GENERAL GINSBURG: But Russell, I
haven't raised any question about that.

MR. TWIST: But you asked--

ASSISTANT ATTORNEY GENERAL GINSBURG: I'm not basing my questions, nor would I base any actions on that particular aspect of the letter.

MR. TWIST; But your question was, was I stern in my language and--

ASSISTANT ATTORNEY GENERAL GINSBURG: And you said you thought you were not.

MR. TWIST: I was not, and in Mr. Hils' letters, he refers to the "Mr. Hils" as being part of that sternness, and so it's absolutely responsive to your question, when you read his letters carefully. And the fact is, he's trying to manufacture fault where none exists.

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He's trying to manufacture things where there's no fault.

ASSISTANT ATTORNEY GENERAL GINSBURG: In the course of that meeting on June 20, did you tell Mr. Hils that you would add his conducting that meeting to your grievance, or, to make it the subject of a grievance if he persisted in it?

MR. TWIST: Yes. I did. And I think that's appropriate, because that's our only form of relief within the Department, and the fact that Mr. Hils is trying to make the grievance procedure, which has been approved by the Attorney General, and the Office of Personnel Management, and the Congress of the United States--to say that there's some threat in saying you're going to file a grievance, is think is very improper, because it's the reverse of trying to intimidate me from using the appeal processes that are established for grieved, or aggrieved employees of the Department.

ASSISTANT ATTORNEY GENERAL GINSBURG: And your position was the conducting this meeting was not an appropriate or acceptable--

MR. TWIST: Under the circumstances.

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ASSISTANT ATTORNEY GENERAL GINSBURG: -- vehicle, and that if he did it, you would--

MR. TWIST: Yes.

ASSISTANT ATTORNEY GENERAL GINSBURG: --grieve on the subject. Was there some other way, and more particularly, did Mr. Hils ask you if there was some other way in which he could discuss your work with you, that you would find acceptable?

MR. TWIST: Yes. He asked that. But let me expand on these answers. I mentioned the grievance because I wanted to impress upon Mr. Hils the seriousness of what I thought the problem was. It would be, I think, extremely dishonorable, and ungentlemanly, to file a grievance when you haven't told somebody how serious you think the conduct in question is.

Because otherwise, people would be slinging grievances at you, and bothering you, when they haven't really told the person they're dealing with in a Field Office, how serious they think the matter is.

And so I told him that because I thought it was extremely serious, as I still do, and I've only filed one grievance in my entire seven years in the Antitrust Division.

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This is the only grievance I've ever filed. It's an appropriate remedy for relief, and it should not be considered by anybody, as being inappropriate, to tell the supervisor you're going to exercise your rights given to you by the Department.

ASSISTANT ATTORNEY GENERAL GINSBURG: When he asked you whether there was any other way in which he could discuss your work with you, what did you say?

MR. TWIST: I said not in the context of that meeting. What he did; he asked that question six times in a row. He kept saying: "You think this meeting's inappropriate?" And I said yes, and I explained why. He kept asking the question, and kept asking the question, six times, and finally--and I gave him the answer each one

of the six times--but--

ASSISTANT ATTORNEY GENERAL GINSBURG: What was the answer?

MR. TWIST: The answer is that I thought that the meeting was a prohibited personnel practice, and I thought it was a violation of the law.

But I said, at the same time, Mr. Hils, that I tell you that, I would go through with the meeting, and I'll

answer all your questions and discuss everything you want. I just wanted it on the record, that I told him that I thought the meetings were objectionable, because if I didn't do that, if I didn't do that, then somebody, later on, would say: "Well, did you tell him you thought something was wrong with the meetings?"

ASSISTANT ATTORNEY GENERAL GINSBURG: But you didn't have any other unobjectionable way of dealing with this

MR. TWIST: Yes. No, that's not--no, that's not, that's not correct. What he said was :"Do you think there's any way to conduct this meeting?" And he asked that six times in a row.

And then he said: "Well, if I came down to your office, could I ask them there?" And now we're moving into the "law school mode," and it was--you know-- then it was the seventh time, trying to play games, and harass me.

And he said: "Well, do you think I can ask you questions about your work?" I said: "Mr. HIls, of course you can ask me questions about my work. If you come down to my office, I'll be happy to answer any question about my work that you wanted. And of course you have that right, if

it's a work-related question." So when he did ask me, is there a way to do it? and he started saying, "Can I come down to your office?", I told him the answer was yes. But even in the meeting I said that I would answer all of his questions and discuss all of my work, and that's in his letter. That's in his own letter.

ASSISTANT ATTORNEY GENERAL GINSBURG: Also in that June 20th meeting, did you tell him you thought he--I'm quoting the letter now--quote, "should be punished", close quote, for his conduct?

MR. TWIST: Yes. I did and I do, and that's why the grievance and OPR needs to finish their work, because I think to put this before OPR and the grievance-- the reason I thought he ought to be punished is, he has told false statements about employees. He's told false statements about Marilyn Bobula, and those are the subject of Marilyn's grievance.

And Joe B. Brown. If you talk with Joe B. Brown, he will tell you the kind of statements that Mr. Hils has made about Marilyn, which are not fair. And likewise, likewise with Althea W. Dortch. He has made statements about her which are not fair, and his conduct, in the broad sense, should be punished, in my opinion. Althea, for

example--

ASSISTANT ATTORNEY GENERAL GINSBURG; Well, you aren't referring just to his conduct at the meeting?

MR. TWIST: No, no, no, absolutely not. And--

ASSISTANT ATTORNEY GENERAL GINSBURG: But you said that you thought the meeting constituted, or persisting in having--

MR. TWIST: Yes.

ASSISTANT ATTORNEY GENERAL GINSBURG: - - the meeting constituted a crime?

MR. TWIST: Yes.

ASSISTANT ATTORNEY GENERAL GINSBURG: And certainly
constituted an adverse personnel action or prohibited personnel action?

MR. TWIST: Yes, yes.

ASSISTANT ATTORNEY GENERAL GINSBURG: And you weren't saying that he should be punished for conducting, persisting in having the meeting?

MR. TWIST: Well, now that was part of it. It's the whole--his conduct as a supervisor should be punished.

That's an example of it. I wasn't limiting it–

ASSISTANT ATTORNEY GENERAL GINSBURG: In a related vein, let me turn to the more recent, the July 3rd meeting, just last Thursday. At that meeting, did you tell Mr. Hils, or threaten Mr. Hils, that he would be– that you would name him in a law suit filed in Federal court, quote, "if all this," close quote–presumably, his attempts to engage in this supervisory role–doesn't stop soon:" And I'm quoting.

MR. TWIST: His quite is correct as I recall it. But all of these things refer to his entire conduct to people in the Cleveland Field Office. It was not in sole relationship to that meeting. And likewise, I'm to the point of just about exhausting my administrative remedies. And I think to file a suit, which is a legal right–it's not a threat– to exercise one's constitutional rights to seek justice and relief, a right all Americans have. That's different from saying I'll punch you in the nose, or I'll say bad things about you, or something like that.

We, in the United States, indicate to people that we think matters are serious enough, that we will file

some type of actions. But it was all of those things, and the statement, as he says it, is correct. And it's if all of these things continue, thee was–it's his entire pattern of conduct. I would name him as an individual because I think that the things he has done are not permissible under the personnel practices of the United States. I think it may involve other plaintiffs. There may be a, you know, some kind of a–it hasn't been–you know, there's no decision

on that. But it's entirely appropriate, and--but it--it was if the future--you know--it's the future. It was not just that meeting.

For example, with Althea W. Dortch, she has been a Federal employee for 27 years, and worded for most of those years for Federal judges in Manhattan who loved her, and thought she was just great. She's a wonderful black woman that is nice and lovely, and smart. Has an 89-year-old mother. She's the sole support of the 89-year-old-mother. She's less than three years away from Federal retirement.

I think she's an extremely able and capable paralegal that I like very much, that I would be happy to have as my paralegal. Marilyn Bobula has told me that she

would be happy to have her as her paralegal. But instead of the management at the Cleveland office transferring her to do the work of the people that like her, and enjoy her, and do a great job, they--Mr. Hils and Mr. Oberdick--keep her under Mr. Oberdick that practically everybody has trouble with, and who he complains about everybody.

And there was no effort to put her with employees that were happy with her, and he said that she was incapable of performing paralegal work, at any grade, but all these Federal judges in Manhattan, and Russell Twist and Marilyn Bobula think she's a super woman, a very nice lady. Two or three years from retirement; sole support of an 89-year-old mother.

And Mr. Hils, Mr. Weedon, have lost an appeal to

Althea Dortch. You know, she did an appeal on their performance rating for her. The PRGC gave her the appeal, raised her performance, and the next year, they, in my opinion, retaliated against her, and gave her a lower rating by listing the kinds of things that all of us do--a typo here, or something there. But these are human things that all of us do in handcrafted products. It's not that we all don't do them; everybody does them. If we

reviewed Douglas Ginsburg correspondence, there'll be a letter left out, or a line left out, and you'll throw your hands in the air and wonder how that happened. If somebody collected years of your work and then said, "Mr. Ginsburg, this is you," if everybody believed them, fine, but it wouldn't be you. She's a good paralegal, and the bottom line on her--why, he framed her, in my opinion, and it's unfair, and ungracious. It's not the way I would run the Federal government, with somebody who's that good, and has 27 years with the Federal service.

ASSISTANT ATTORNEY GENERAL GINSBURG: You're obviously a rather close observer, or interested observer of the way in which the office is run, not only in your own--

MR. TWIST: Yes. That's right.

ASSISTANT ATTORNEY GENERAL GINSBURG: -- personnel matters, but in respect of others as well.

MR. TWIST: That's right. Because, like you, who-- you have devoted many of your years to justice and American

government, and you've worked hard to do that, and the country's better for it, Mr. ginsburg. And I likewise, even though I have achieved nothing compared

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to you, I like the same goals. I like to see a good country, a happy country, with an efficient and capable Federal government.

ASSISTANT ATTORNEY GENERAL GINSBURG: Let me return to the events of June 20th, briefly, and finish my questions.

You showed me a draft of a memorandum that you characterized as not even constituting a real draft--

MR. TWIST: Yes, yes.

ASSISTANT ATTORNEY GENERAL GINSBURG; -- because it
had insertions and things to be--

MR. TWIST: Yes.

ASSISTANT ATTORNEY GENERAL GINSBURG; --pasted in, and so on. that was the state of the draft as of the time of the meeting of June 20th, or roughly, something like that, is that correct?

MR. TWIST; Yeah, something like it. It needed things put in it. And by my definition--I mean, maybe people may fault me but I didn't consider that a draft.

ASSISTANT ATTORNEY GENERAL GINSBURG; And the way things were left at the end of that meeting, in its present condition, you did not turn it over?

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MR. TWIST: It wasn't asked for.

ASSISTANT ATTORNEY GENERAL GINSBURG: Okay. But at the end of the day, that same day, was it then, later, asked for?

MR. TWIST: Yes, it was, and then it'd come out of the machine, and I gave it to Mr. Hils with a caveat. I said: "Look. I haven't been able to check the citations on this thing, and I haven't been able to proof it, and I would like to do that over the weekend. But here it is." And in fact when I checked it over the weekend I had a pile of grand jury transcripts, and it was a page off here and something off there, and I made changes again.

ASSISTANT ATTORNEY GENERAL GINSBURG: Putting aside
the question of whether the text that was available in the morning and was still being revised or entered into the machine and was till being revised or entered into the machine to produce the afternoon text–

MR. TWIST: Yes.

ASSISTANT ATTORNEY GENERAL GINSBURG: – putting aside the question of whether that constituted a separate draft, was the draft that you certainly gave him at the end of the day, the first or second or fifth draft of the

memorandum?

MR. TWIST; I think it was the fifth. But everything that the earlier things corrected were in it. In other words, there was nothing in it that was left out of the earlier drafts.

ASSISTANT ATTORNEY GENERAL GINSBURG: Where were the
first four drafts?

MR. TWIST: Where?

ASSISTANT ATTORNEY GENERAL GINSBURG: Where were the first four drafts?

MR. TWIST: They were--well, they're not drafts. Essentially I would--because memo is a fact memo and I'd have to go through lots of different things; even though they're coming out of the machine, it's just that I'm typing it is--I put it in the machine so I can deal with the typed rather than the written.

ASSISTANT ATTORNEY GENERAL GINSBURG: So is this the fifth product to come out of the machine?

MR. TWIST: Yes. It was the fifth product out of the machine but it wasn't really a fifth draft. It was an ongoing, how I was writing the thing, putting things in it.

ASSISTANT ATTORNEY GENERAL GINSBURG: And had you

given Mr. Hils the previous four--

MR. TWIST: I don't think so.

ASSISTANT ATTORNEY GENERAL GINSBURG: -- things that
came out of the machine?

MR. TWIST: I don't think so, but when I told him, when I told him in the morning where the thing stood--all of the earlier things out of the typewriter were all incorporated in the thing I was working with, they weren't separate things about--

ASSISTANT ATTORNEY GENERAL GINSBURG: Well, hadn't you been asked by Mr. Weedon to produce, at these weekly meetings, all of the drafts of your work during the preceding week?

MR. TWIST: What we consider drafts in the office, under my understanding, are things for review. In other words, prepare a draft of a letter; prepare a draft of a report.

Those things come up as a draft to the Chief, so he can look at them and review them. We don't consider drafts products that people are working done, because there's nothing done. There was no finished--there wasn't even a -- it was incipient. It was being done. It was coming out of a machine and it has numbers on it, but they weren't separate things.

ASSISTANT ATTORNEY GENERAL GINSBURG: Well, had Mr. Weedon, at any time prior to the June 20th meeting, perhaps

in May, ever warned you about insubordinate or disrespectful behavior?

MR. TWIST: Only in the things he wrote, and he never--

ASSISTANT ATTORNEY GENERAL GINSBURG: So he warned you in writing about it?

MR. TWIST: It was in regard to a meeting with Mark Leddy, and that was the only time he ever--that was the only thing he ever referred to.

ASSISTANT ATTORNEY GENERAL GINSBURG: What happened at the meeting to occasion that?

MR. TWIST: Well, it was something to the effect that we were discussing the production dates for documents in Press/Plain Dealer and the DELETIONS MADE BY THE GOVERNMENT ,and the fact was that there were DELETIONS MADE BY THE GOVERNMENT

ASSISTANT ATTORNEY GENERAL GINSBURG: Let me, one
other question, Mr. Twist, Did Weedon have occasion,

Mr. Weedon, have occasion to write you a memorandum that talked about insubordination and disrespectful behavior because you had engaged in any such behavior, in his view?

MR. TWIST: Let me describe a little bit what
the things was, because when you hear the whole thing

you'll appreciate it better.

ASSISTANT ATTORNEY GENERAL GINSBURG: Well, I really
don't want to hear the story of the case.

MR. TWIST: But you have to, Mr. Ginsburg.

ASSISTANT ATTORNEY GENERAL GINSBURG; No. I don't.

MR. TWIST: You can't keep trying not to get the evidence that helps me.

ASSISTANT ATTORNEY GENERAL GINSBURG: No, No. I'm
not trying to exclude anything. I just want to know whether, when Weedon made those references in a memorandum, it was simply a word to the wise, or, based on a concern that you'd already engaged in that kind of behavior?

MR. TWIST: My understanding was it dealt with this one incident, and what happened, when Mr. Leddy wanted

an extremely short time period--I think it was four or five months for the production of documents--when I pointed out to him why that was silly, based on the information we had about the--he says,"Oh, I see, I sse; yes that;s right." and Mr. Leddy agreed with him, and moved his date back to January 1, 1982, rather than April '82, and he agreed with me. And Mr. Weedon later came around and made a point that that was disrespectful even

though Mark Leddy had moved the date for the documents back from January 1–if I said June, I didn't mean it– January 1, 1982, rather than March or April.

He put the January, February, March–three months, more months of documents in, and he agreed with me that Mr. Weedon didn't recall that or conveniently forgot it.

And so that was the incident he was referring to and that's the incident he's always told me about, and even Mark Leddy agreed, that cutting the documents off in April would have been a mistake.

ASSISTANT ATTORNEY GENERAL GINSBURG; I have about five more minutes that I can devote to this matter now, today. If you have anything else you wold like to have

reflected in the transcript, please take as much of that five minutes as you'd like. But bear in mind that you'll have a copy of this transcript in a few days.

MR. TWIST: Yes.

ASSISTANT ATTORNEY GENERAL GINSBURG: I would like you to have the opportunity to review the transcript and to add anything that you want to it, and to submit that sort of supplemental material to me in the next one week.

Now I understand that you have annual leave coming up?

MR. TWIST: Yes; yes, I do.

ASSISTANT ATTORNEY GENERAL GINSBURG: Starting when?

MR. TWIST; Starting–I think it's the 19th.

ASSISTANT ATTORNEY GENERAL GINSBURG: Friday's the 18th.

MR. TWIST: Oh. Then it's the 19th.

ASSISTANT ATTORNEY GENERAL GINSBURG: So you will be on annual leave after the end of next week?

MR. TWIST: Yes.

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ASSISTANT ATTORNEY GENERAL GINSBURG: All right. Would you be sure, that if you want to supplement the record in any way, that you do so before you have your annual leave.

MR. TWIST: I think that's an insufficiently short period of time.

ASSISTANT ATTORNEY GENERAL GINSBURG: Well, then, tell me what you think is an appropriate amount of time.

MR. TWIST: Well, I'd like to be able to take my vacation and then have some time after that to do it, if that's possible.

ASSISTANT ATTORNEY GENERAL GINSBURG: I think that it would be overly–

MR. TWIST: Because I can only use the evenings.

ASSISTANT ATTORNEY GENERAL GINSBURG: No. It would prolong this matter, unduly, for me to wait until after you've returned from your vacation, in order to have your full response to these questions.

MR. TWIST Well, can I do it during office time then, because if I only have the evenings–it's all that I've been permitted. We have done all these appeals,

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and things, in the evenings, except for getting them typed, taking the time from our families and children, practically the whole year. And doing this in an evening, it's just like writing a whole other appeal. It would be, I think, essentially impossible.

But while you think about that, let me say that I was never disrespectful to Mr. Hils or to Mr. Weedon. Mr. Hils, for example, says that It's disrespectful to tell a manager that you think that something he's engaged in is bad management.

That is essentially to say that we can never make suggestions for better management, to say that you can't criticize something as not being as good as it could be.

I think that you do want the suggestions from your employees, if you think–if they think that something

isn't well managed, to be able to make it better managed. And I don't think that's disrespectful and you probably tell your superiors how things can be better managed yourself.

So I was never disrespectful to any of my superiors, and in fact, even when you sent me to Cleveland,

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which was the most hurtful thing in my entire life, you know I was never disrespectful. And that should be your best judge, that that claim of disrespectful is not correct.

Because had I really been a disrespectful type of person, I would have been disrespectful then, and I wasn't.

And when you called me up on the phone and we discussed my going away, I wasn't disrespectful. I was hurt, and my family was hurt, but I never said anything or did anything disrespectful.

So I would hope, if you chastise me, you chastise me for things I deserve, and it's not disrespectful, and it's not bad judgment, and it's not divulging grand jury information. It's none of those things.

Mr. Weedon and Mr. Hils have been making allegations about me now ever since I told them about a crime. They keep changing their allegations.

There's a whole great big long series of things that they drop, and then they bring up new ones, and they drop and they bring up new ones.

They're the ones harassing me and they're trying to cover up their own improper conduct, and one of the ways they're trying to do that is to say, well, this guy's a bad lawyer; he can't write, he can't thin; he can't do anything. So we'll make him look like a terrible lawyer; we'll destroy his credibility.

And then when it comes around to him saying they committed
a crime, Weedon and Hils would simply say, "Well, he's no good; we fired him because he was no good." And it's that kind of thing attempt to destroy my credibility, is part of a cover-up, and it's also retaliation.

And therefore, you know, before my wife is destroyed more and my family's hurt more, I would almost just beg you to put me someplace where they really want the work done, where they'll let me be good and honest and work hard.

Because what I did in the Press/Plain-Dealer grand jury for you was give you a brilliant case. The DELETION MADE BY THE GOVERNMENT was an idea that I came away from the AT&T litigation. It was good. It advanced antitrust. It made a case here nobody thought there could be one. Mr. Weedon only asked for five percent of the withheld documents.

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He told Washington there was only something like 1100 documents withheld. There were several thousand, two thousand, whatever, withheld.

So he mislead the Division. He doesn't let you know what's going on out there. He's had constant trouble with the people in his office. He could have held DELETIONS MADE BY THE GOVERNMENT

DELETIONS MADE BY THE GOVERNMENT

DELETIONS MADE BY THE GOVERNMENT

There are documents he hasn't gotten.

I gave you a brilliant case. I'm a good lawyer and an honest lawyer, and I would hope you could put me in a place where they truly want the work done, and let me do it.

Because if I could do that, I wouldn't worry about-- I'd let you people worry about Press/Plain Dealer. I would sit and do my work. And that's in fact what I did in Cleveland, was sit and do my work.

Well, I think the problem is that there has been a disagreement on whether these things that I think ought to be done should be done.

So if you put me in an area somewhere in the

Department where the people, where there was no question they wanted the things done, I think that's where the real rub has been.

ASSISTANT ATTORNEY GENERAL GINSBURG: On the basis of the questions that you answered earlier about the meeting of June 20 and July the 3rd, and on the impression I have of the way in which your current, the allegations you've just made about Mr. Hils, and I think Mr. Weedon, affect the supervisory relationship I'm going to put you on administrative leave from now until your annual vacation or annual leave takes effect.

You'll have from now until your annual leave, with salary, except if there's a necessity to go to the office to remove any personal things that you need, which you could do today or tomorrow, I expect you not to appear at the office from now until after your annual leave. That will also give you more than sufficient time between now and your annual
leave to submit any additional material that you wanted to submit
for the record of this meeting today.

MR. TWIST: Can I continue my comments because I would like to try and get them on the record, if I could?

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ASSISTANT ATTORNEY GENERAL GINSBURG: I'm going to have to leave. You're going to have an opportunity to supplement the record not just extempore, or from notes, but in the considered fashion that you might prefer, between now and the end of next week.

MR. TWIST: When do you want it in?

ASSISTANT ATTORNEY GENERAL GINSBURG: The end of

next week.

MR. TWIST: The end of next week.

ASSISTANT ATTORNEY GENERAL GINSBURG; You'll have all of that time to prepare.

MR. TWIST: May I arrange with you now to have a meeting with my lawyers? I would like to make that request of you.

ASSISTANT ATTORNEY GENERAL GINSBURG: No. I'm not
prepared to do that now. When I made a recommendation to the Department, I may, at that time, be willing to do so, but certainly not now.

MR. TWIST: How would you be happy with me proceeding

with my grievance? I don't think Mr. Andewelt– I've judged Mr. Andewelt, being the decision-maker. I need a fact finder for the grievance, and if you don't have the authority to place me in some other part of the Division, I would like to get the grievance into the hands of somebody who can.

So I need to make sure that the person was the right authority, and that we have a fact finder for those things.

ASSISTANT ATTORNEY GENERAL GINSBURG: Well, I can't advise you on how to proceed. I'm sure that appropriate regulations and your own good counsel will suffice.

MR. TWIST: Okay. In all of the five meetings– I think there are five–they have never told me at all, how to improve my work. They collect drafts and I've given drafts of things to Mr. Weedon.

Neither Mr. Hils nor Mr. Weedon ever told him, at any time, how to improve my work. They never–

ASSISTANT ATTORNEY GENERAL GINSBURG: Is this the subject of your grievance?

MR. TWIST: No, this is for the meetings. In all of

those meetings, they never once told me how to improve my work. All they did was collect things to make a file on me.

They never ever suggested any ways for me to improve my work. Mr. Hils never said I was disrespectful in those meetings to him.

He never said I was intimidating him. He never said any of those things. The first time I saw those things was in the letter he sent me.

Those things were never brought up, and if those were really the concerns that they had, and the meetings were to improve my performance, they should have said

something like, now there's an example where you're being disrespectful; or here's an example of this.

But they never did that; they never used those meetings to help me.

ASSISTANT ATTORNEY GENERAL GINSBURG: I think the answers that you gave me earlier to the questions are sufficient to, at least for me to have concluded, preliminarily, that the account in Mr. Hils' letters supports just that conclusion, that you have been insubordinate and disrespectful. But I am not

prepared to reach that conclusion, as a final matter, without having let you have an opportunity to respond further in writing.

That's why I have decided that the appropriate thing here is for you to be on administrative leave only until your annual leave, and not indefinitely, so that I can have the benefits of your response, in writing, and make a recommendation after I've had a chance to review the transcript.

Now that said, I'm going to have to call an end to this. You've answered all of my questions to the obvious limits of your willingness or ability.

Any further statements can be just as well made in the course of a written addendum.

MR. TWIST: One final one. It'll just take a minute. I never refused to work on the concrete matter.

I attended the meeting, and in fact, on July 1, Mister--

ASSISTANT ATTORNEY GENERAL GINSBURG: That's just not a subject of my concern here.

MR. TWIST: But I never refused.

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ASSISTANT ATTORNEY GENERAL GINSBURG: Thank you for coming here. Do you expect you will have to go to the office to remove things?

MR. TWIST: I'd have to think about that.

ASSISTANT ATTORNEY GENERAL GINSBURG: Well, I would
appreciate it if you would do so by the end of the day tomorrow, rather than at some later time during the week.

(Whereupon, at 2:40 p.m., the meeting was concluded.)

JA 264

U.S.Department of Justice
Washington, D.C. 20530

July 11, 1986

To: C. Russell Twist
Attorney, Cleveland Offices
Antitrust Division

G-93

FROM: Michael E. DeBow
Special Assistant to the
Assistant Attorney General
Antitrust Division

RE: Decision Regarding Appeal of Within
Grade Increase Denial

The Antitrust Division has decided to delay decision on your within grade increase denial appeal until the Office of Professional Responsibility issues a decision on its pending investigation.

JA 265

cc: Roger Andewelt, David P. Bobzien (OPR),
CRTwist:ce/49
C. Russell Twist

Response to Allegations of David F. Hils
July 22, 1986

SENT VIA MAILWAY TO
WASHINGTON/ COPY
ALSO SENT EXPRESS
WITH ENCLOSURE

Douglas H. Ginsburg
Assistant Attorney General
Antitrust Division

Charles Russell Twist
Attorney
Great Lakes Office

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JA 267

INTRODUCTION AND SUMMARY

You have asked me to respond to allegations made by David F. Hils, Assistant Chief of the Great Lakes Office, in

his letter to you, dated June 25, 1986 and July 8, 1986, requesting that I be fired. This memorandum supplements the information I provided during my July 9, 1986 meeting with you, Roger Andewelt, and Mr. Hils.1/

1/ The transcript of the July 9, 1986 meeting is enclosed and forms an integral part of this response. Similarly, I incorporate my June 23, 1986 Grievance and the entire Grievance record as another essential part of my response.

Two things are obvious from a review of Mr. Hils' letters:

1. His allegations and request for my removal are a retaliatory and defensive reaction to my June 23, 1986 Grievance; and
2. The relief sought by my Grievance is justified and necessary.

These two subjects are discussed in more detail in Parts II and III, below.

Mr. Hils' letters and recommendations actually prove the central issue of the Grievance--an employee who has reported the criminal misconduct of some of his supervisors should not be assigned to continue to report to these same supervisors.

Because of their obvious conflicts of interests, and their

inability to be fair and objective, persons I have reported to the Office of Professional Responsibility ("OPR"), or who are implicated by the evidence before the OPR, should not be permitted to make any adverse personnel decisions affecting me. Mr. Hils is one of these persons.

A review of my Grievance and Mr. Hils' letters shows that it is not possible to separate them. Indeed, they are so integrated that a ruling on one necessarily decides the other. Therefore, I request that Mr. Hils' letters, the transcript of the July 9, 1986 meeting, and this response memorandum be forwarded to Labor-Management Relations for inclusion in the file on my June 23, 1986 Grievance.

JA 268

Clearly, it would be highly improper to adopt Mr. Hils' request that I be fired, prior to concluding my Grievance; because such action would amount to a negative decision on the Grievance without adherence to the mandated grievance procedures. The Grievance must be completed prior to the Division's taking any action that is directly contrary to the relief sought by it. The Antitrust Division cannot simply ignore the Grievance or delay it. Nor can the Division hope to avoid the Grievance and its issues by firing me. The July 9, 1986 meeting confirms the seriousness and importance of the central issue of the Grievance and demonstrates the necessity for expeditious resolution of it.

Part IV of this memorandum restates my July 9, 1986 objection to the selection of Roger Andewelt as the decision-maker for the Grievance, because Mr. Andewelt lacks the authority to provide the relief sought. Similarly, Part IV explains why the investigation being conducted

by the OPR cannot be substituted for fact-finding. Moreover, the Antitrust Division does not have the authority to select the Grievance Examiner.

Part VI of this memorandum demonstrates that Mr. Hils has deliberately mischaracterized the conversation he cites in his letters. Even if believed and even if taken cumulatively, the complaints in his letters are so trivial in nature that they do not justify the extreme action of firing. Mr. Hils' decision to offer such a recommendation based on such clearly insignificant grounds can only be be wanton or malicious. (This same intent can be inferred from Mr. Weedon's apparent endorsement of the request.) Regardless, as Part V of this memorandum points out, I was not afforded the proper notice prerequisite to firing.

Moreover, the Grievance fact-finding will prove that I am being subjected to disparate treatment; and it will show that Mr. Weedon and Mr. Hils, while frequently disregarding
serious problems caused by the unsatisfactory performance of others, are perpetually searching to manufacture fault with and present exaggerated complaints about my work and the work of others who have provided testimony against them. This disparate treatment provides further evidence of their bad faith.

Finally, for the reasons stated in the Grievance, I cannot be expected to continue to report to Mr. Weedon and Mr. Hils. Even Mr. Hils agrees in his letters that such a situation is intolerable. Therefore, it seems most appropriate that, upon my August 18, 1986 return from annual leave, I be detailed to the United States Attorney's Office, either in Washington, D.C. or in Cleveland, Ohio. until resolution of the Grievance

and completion of the OPR investigation.

JA 269

II

MR. HILS' LETTERS ARE A RETALIATORY AND DEFENSIVE REACTION TO MY JUNE 23, 1986 GRIEVANCE

The June 25 and July 8, 1986 letters from David F. Hils to Douglas H. Ginsburg are obviously a response to my June 23, 1986 Grievance. The retaliatory intent behind these letters is clear. First, Mr. Hils is engaging in retaliation for my filing a Grievance and for my making some of his improper conduct toward employees in the Great Lakes Office an issue of the Grievance. Second, and even more significant, he is retaliating against me for reporting his participation in the conspiracy to obstruct the Press/Plain Dealer grand jury investigation and his participation in the efforts to cover up the obstruction. Finally, he is retaliating against me for being one of DELETION MADE BY THE GOVERNMENT representatives and witnesses in DELETION MADE BY THE GOVERNMENT grievance hearing on April 14-16, 1986. Mr. Hils was DELETION MADE BY THE GOVERNMENT representative and, thus, held the position comparable to mine for the opposite side.

Obvious proof that Mr. Hils' letters are a retaliatory and defensive response to my Grievance is found in their timing. My Grievance was filed June 23, 1986. Mr. Hils' first letter is dated June 25, 1986 and his second letter is dated July 8, 1986. This proximity of time, along with the items discussed below, proves Mr. Hils' letters are

a reaction to my Grievance and cannot be viewed or considered separately from it.

An analysis of the contents of Mr. Hils' June 25, 1986 letter also corroborates that it is retaliation for my filing a grievance and was written to re responsive to it. For example, Mr. Hils' June 25, 1986 letter expressly refers to the Grievance no less than seven times. These seven references to the Grievance prove a clear nexus between my June 23, 1986 Grievance and Mr. Hils' recommendation on June 25 and July 8, 1986 that I be fired.

Furthermore, Mr. Hils refers to three meetings I had with Mr. Weedon or Mr. Hils. The substance of the first meeting, held on June 16, 1986, formed a principle element of my Grievance. I did not want to be assigned to the concrete pipe investigation, because that assignment would require that I work directly with Mr. Hils and DELETION MADE BY THE GOVERNMENT. The reasons for my desire not to work with these DELETION MADE BY THE GOVERNMENT is set forth in Section VI below.

Similarly, the second and third meetings discussed in Mr. Hils' letters were conducted by Mr. Hils on June 20, 1986 and July 3, 1986. These two meetings also formed a principle element of my Grievance, because the Grievance specifically seeks relief from being required to attend the meetings required by Mr. Weedon's May 21, 1986 memorandum and explains why this relief is justified and necessary.

A review of my Grievance and Mr. Hils' letters, proves a clear nexus between the substantive issues in my Grievance

and his letters recommending that I be fired. It is no coincidence that the subject matter of Mr. Hils' complaints is identical with the subject matters raised in my Grievance.

Mr. Hils admits that I told him that I was going to file a grievance and that I was going to make these references to him. The fact is that, in an effort to resolve the problems, I told Mr. Hils exactly what I considered important enough to include in the Grievance.

Any fair-minded review who understands the nexus between my Grievance and Mr. Hils's letters will easily see that the allegations Mr. Hils sets forth in his letters are actually his attempts to present defenses for his improper conduct. Each of these allegations is a clear response to a particular issue raised first in my Grievance. A scrutiny of the Grievance and Mr. Hils' letters reveals that each of his allegations was designed and calculated to cover up his own improper conduct and to divert attention away from himself.

Moreover, this new act of retaliation cannot be viewed in isolation. It is merely one more act in a pattern of retaliatory conduct engaged in by Mr. Weedon and Mr. Hils, over a long period of time, against me, DELETIONS MADE BY THE GOVERNMENT 2/

2/ Most of this conduct against me, DELETIONS MADE BY THE
GOVERNMENT was reviewed and approved by DELETIONS MADE BY THE GOVERNMENT

This retaliatory course of conduct by Mr. Weedon and Mr. Hils against these three other employees and me is briefly outlined in the following chronologies. These chronologies amply demonstrate a considerable pattern of prohibited conduct. This extensive pattern also persuasively shows that Mr. Weedon's and Mr. Hils' repeated abuses of authority are deliberate and knowing. There can be no doubt from this record that Mr. Weedon, Mr. Hils and Mr. Widmar have engaged
in intentionally malicious conduct in obvious bad faith.

A. Prohibited Conduct Against C. Russell Twist--1984

I refused to participate in Mr. Weedon's efforts to obstruct the Press/Plain Dealer grand jury investigation. I applied my best efforts to advancing the prosecution of that matter.

JA 271

1984

Mr. Weedon engaged in day-to-day harassment of me.

February 1985

DELETION MADE BY THE GOVERNMENT and I prepared a
written dissent to Mr. Weedon's memorandum to Mr. Widmar requesting authorization to immunize
tow of the three putative targets of the investigation.

Mr. Weedon became increasingly more difficult and hostile during staff meetings.

March 1985

Mr. Weedon prepared a deliberately false memorandum to the April Promotion Committee in which he recommended that I be denied promotion to GS-15. Mr. Weedon's negative recommendation was clearly an act of retaliation because Mr. Weedon was aware that I had already been performing GS-15 work since my entry to the Cleveland Field Office in June 1984 (a continuous period of nine months), and he continued to assign me to increasingly more difficult work on the GS-15 level.

Spring 1985

I reported Mr. Weedon's criminal conduct regarding the Press/Plain Dealer grand jury to the United States Attorney and the federal district court for the Northern District of Ohio.

Summer 1985

Mr. Weedon prepared a deliberately false and punitive performance rating for me, rating me Unsatisfactory on two our of seven critical elements and Unsatisfactory on the overall rating. Mr. Weedon expressly cited my reporting the obstruction of justice to the court as the basis for the Unsatisfactory rating.

Mr. Widmar, the Reviewing Official, approved the erroneous rating, even though he was aware that I was performing GS-15 work while still only a GS-14, and

even though he was aware that the Code of Professional Responsibility required that I report the criminal conduct.

On October 1, 1985, I appealed the erroneous performance rating to Douglas H. Ginsburg, Assistant Attorney General for the Antitrust Division. My appeal memorandum detailed some of the evidence of the obstruction of justice by Mr. Weedon and others. The Antitrust Division, ignoring my objections, disregarded Division regulations regarding the appeal procedures. The appeal of my 1985 performance rating is still pending.

JA 272

September 1985

Mr. Weedon prepared a second false memorandum for the October Promotion Committee, in which he recommended that I again be denied promotion to GS-15. This was in spite of the fact that I had been performing increasingly GS-15 level work for almost a year and a half, while still only a GS-14. On October 17, 1985, I submitted a Counterevaluation to Mr. Weedon's memorandum and that appeal is still pending before Mr. Ginsburg.

October 1985

The Antitrust Division forwarded my performance rating appeal to the Office of Professional Responsibility to investigate the evidence of obstruction of justice.

October 18, 1985

The day after I submitted my promotion Counterevaluation, Mr. Weedon presented me with a 90-day notice that he was considering recommending that I be fired. This memorandum contained numerous false statements about my performance. There is no appeal procedure for the 90-day notice.

Late 1985-early 1986

Mr. Weedon escalated his day-to-day harassment of me.

January 1986

Mr. Weedon presented me with a deliberately false performance rating, in which he rated me Unsatisfactory. Mr. Widmar, the Reviewing Official, approved the erroneous rating, even though he was aware of the high quality of my work and even though he was aware that I was performing GS-15 level work while still only a GS-14. There are no appeal rights for mid-year informal performance ratings.
DELETIONS MADE BY THE GOVERNMENT 1986

I served as one of DELETIONS MADE BY THE GOVERNMENT representatives during the three days of hearings on DELETIONS MADE BY THE GOVERNMENT grievance. On DELETIONS MADE BY THE GOVERNMENT 1986, I testified for DELETIONS MADE BY THE GOVERNMENT at the grievance

hearing.

May 2, 1986

In response to a request by the Office of Professional Responsibility ("OPR"), the Antitrust Division allocated hours of official time to me to assist the OPR investigation. On or about this time, the OPR scheduled an interview with Mr. Weedon in Cleveland.

JA 273

May 8, 1986

Mr. Weedon punitively denied my within-grade pay increase from GS-14 Step 4 to GS-14 Step 5. The appeal of the within-grade denial has been stayed, pending the conclusion of the OPR investigation.

May 12-13, 1986

Mr. Weedon appeared for questioning by the OPR. On or about this time, the OPR scheduled additional interviews with high level Antitrust Division employees and former employees.

May 21, 1986

Mr. Weedon presented me with a second 90-day notice that he was considering recommending that I be fired. This memorandum contained numerous false statements about my performance. There is no appeal procedure for the 90-day notice.

May-June 1986

Mr. Weedon held additional weekly meetings. Though Mr. Weedon collected copies each week of all of my written work, he never offered one suggestion on how to improve it. Though Mr. Weedon began to greatly expand my work load and require that all the matters be done as rapidly as possible, he refused to help set priorities for the work, thus hoping that he could later find fault that some work was not immediately completed. In truth, there have have been too many assignments to do them all immediately.

June 20 1986

Mr. Hils held his first weekly meeting. He harassed me, badgered me, and had no suggestions on how to improve my work.

I informed him that I intended to file a grievance to seek relief from his improper conduct. I also informed him that I believe the meetings are a prohibited personnel practice and a violation of the law.

JA 274

June 23, 1986

I filed a grievance with Douglas H. Ginsburg, Assistant Attorney General for Antitrust, and referred to the improper conduct of Mr. Weedon and Mr. Hils. I asked not to be rated or have an personnel actions recommended by anyone I had reported tot he OPR. I also requested termination of the weekly meetings.

June 25, 1986

In retaliation for the Grievance, Mr. Hils, who is also a person I had reported to the OPR, submitted a memorandum to Douglas H. Ginsburg mischaracterizing the June 20, 1986 weekly meeting and recommended that I be fired. Mr. Hils did not inform me of this recommendation or provide me with a copy of the memorandum. (I did not discover it until two weeks later, after I had been ordered to Washington to discuss my removal.)

July 3, 1986

Mr. Hils held his second weekly meeting. He did not inform me of his June 25, 1986 letter recommending that I be fired. He made no complaint about any of my work and again made no suggestion as to how I could improve. At no time did he say he thought I was disrespectful, harassing, or intimidating. In contrast, Mr. Hils was haughty and arrogant.

July 8, 1986

I was ordered to Washington by Douglas H. Ginsburg, Assistant Attorney General for Antitrust, to meet with him, Roger Andewelt and Mr. Hils on July 9, 1986 at 1:30 p.m. Ralph Justice, Executive Officer of the Antitrust Division, informed me that the purpose of the meeting was to discuss Mr. Hils' recommendation in his June 25, 1986 letter that I be fired.

This telephone call from Mr. Justice was my first notice of Mr. Hils' June 25, 1986 letter. I obtained a copy of the letter from Mr. Hils, after this call. Mr Justice refused my request to have a lawyer accompany me to the meeting.

At 5:20 p.m. Mr. Hils gave me a copy of his second letter to Douglas H. Ginsburg. This letter recommended my immediate
removal.

July 9, 1986

I met with Douglas H. Ginsburg, Roger Andewelt and Mr. Hils.
A court reporter was present. I informed Mr. Ginsburg that I was
not given adequate notice of the meeting and had not had sufficient time to prepare or consult fully with a lawyer. I again requested the opportunity to have a lawyer present at the meeting. Mr. Ginsburg refused my request. At the conclusion of the meeting, Mr. Ginsburg placed me on administrative leave.

DELETIONS WERE MADE BY THE GOVERNMENT FOR ALL MATERIAL FROM THIS POINT TO THE TOP OF PAGE 19

* * *

In summary, Mr. Hils had two purposes in mind when

he wrote his June 25 and July 3, 1986 letters. He wanted to retaliate against me and he wanted to prepare self-serving statements to defend his conduct and divert attention away from his own improper acts. The proximity of time between the filing of my Grievance and Mr. Hils' submission of his request that I be fired, as well as the context of the letters set forth in the above chronologies, further supports these conclusions.

III

MR. HILS LETTERS PROVE THAT THE RELIEF SOUGHT BY MY GRIEVANCE IS JUSTIFIED AND NECESSARY

The letters prepared by Mr. Hils provide compelling proof that the relief sought by my Grievance is justified and necessary. The central issue of my grievance is whether an employee who has reported the criminal misconduct of some of his supervisors should be assigned to continue to report to those same supervisors. This issue precisely describes the situation created by my continued assignment to the Great Lakes Office, under Mr. Weedon and Mr. Hils.6/

6/ As you are aware, both Mr. Weedon and Mr. Hils are implicated by the evidence before the OPR for, among other things, obstruction of justice and for violations of 18 U.S.C. s 4. Mr. Hils participated in misinforming the federal district court; and, he also allows the obstruction to continue

whenever he serves as Acting Chief of the Great Lakes Office.

Because of their obvious conflict of interests, and their inability to be fair and objective, persons I have reported to the OPR, or who are implicated by the evidence before the OPR, should not be able to make or recommend any personnel decisions affecting me. The potential and incentive for retaliation are too great.

JA 277

Mr. Hils, a supervisor I have reported, has requested that I be fired. Thus, his conduct is not only the subject matter of the Grievance; it is also exactly the abuse that the Grievance seeks to prevent. Mr. Hils, through his letters, has proven the legitimacy and importance of the relief sought by the Grievance and has confirmed the necessity for providing this relief expeditiously.

Moreover, the manner in which the July 9, 1986 meeting was conducted indicates that the decision to fire me has been made prior to the conclusion of the 90-day waiting period and without my having been given an opportunity to respond to the false allegations in the 90-day notices. It also follows that, if a decision to fire me has already been made, the weekly meetings with Mr. Weedon and Mr. Hils have been a ruse to provide them with another opportunity to harass me.

For example, Mr. Hils secretly recommended that I be

fired on June 25, 1986 and then went through the charade of holding a meeting with me on July 3, 1986 purportedly to help me with my performance. How can anyone believe that Mr. Hils was honestly trying to help me with my performance on July 3, 1986 when he had already secretly recommended that I be fired.

This conduct reveals Mr. Hils' character and shows the obvious bad faith with which he conducted the July 3, 1986 meeting. It also shows the malicious intent and bad faith behind his letter of July 8, 1986.

Clearly, I cannot be expected to continue to report to Mr. Weedon and Mr. Hils. Even Mr. Hils agrees in his letters that such a situation is intolerable. Nor should I be punished by firing because I have reported the criminal misconduct of some of my supervisors. If they are left in their supervisory positions, I should be assigned to another office.

IV

DEPARTMENT OF JUSTICE REGULATIONS MUST BE FOLLOWED IN THE HANDLING OF MY GRIEVANCE

As explained above, my Grievance and Mr. Hils' letters requesting that I be fired cannot be separated. Thus, to adopt Mr. Hils' recommendation is, in effect, to make a negative determination on the Grievance; because, acting on his recommendation is to permit a person I have reported to the OPR to make an adverse administrative decision affecting me. This is the central issue of the Grievance.

This is obviously an improper and impermissible way to handle my Grievance. The mandated regulations of the Department
of Justice for handling grievances must be followed before any decision is reached. Therefore, I must respectfully object to: (1) the appointment of Roger Andewelt as the decision-maker on the Grievance; (2) the attempt to substitute the OPR investigation for grievance fact-finding; and (3) the manner in which the Division has construed the Grievance.

A. Roger Andewelt is Not A proper Decision-Maker

As I explained during the July 9, 1986 meeting, the decision-maker on a grievance must be a person capable of providing the relief sought. Because Roger Andewelt does not have the authority to provide the primary relief sought by my Grievance, (transfer to another division in the Department of Justice), Mr. Andewelt is not an appropriate
decision-maker.

It is not clear whether an Assistant Attorney General has this protective transfer authority. Obviously, my Grievance, which raises an issue that is important to the entire Department of Justice, should be decided on a level higher than any division. Therefore, I respectfully request that the Grievance be promptly forwarded to an appropriate decision-maker who is able to grant the relief requested.7/

7/ Because Mr. Andewelt is not an appropriate decision-maker, the Grievance must be considered de novo, in its entirety, by a properly appointed decision-maker. Therefore, all of the items

of relief sought, at pages 6 through 8 of the Grievance memorandum, should be viewed as still pending, including my request that I not receive a formal performance appraisal for the period July 1, 1985 through June 30, 1986.

B. The OPR Investigation Cannot Be Substituted for Fact-Finding

During the July 9, 1986 meeting, I also explained that the investigation being conducted by the OPR fails to be an equivalent substitute for grievance fact-finding. Obviously, the OPR investigation into obstruction of justice and misprision of a felony will not totally encompass all of the issues raised by the Grievance.

JA 279

For example, the OPR will not be in a position to offer detailed findings of fact regarding the retaliation by some of my supervisors, their abuse of authority, their harassment, and their violations of Items 22 and 23, in Order 1752.1A, Appendix 1, Standard Schedule of Disciplinary Offenses. Because the OPR investigation and the Grievance do not share identify of issues, I respectfully request the immediate appointment of a Grievance Examiner by Labor-Management Relations.

In this regard, it must be noted that the Antitrust Division does not have the authority to appoint the Grievance Examiner. This decision is only properly made by Labor-Management Relations. I do not waive any of my grievance rights and I must object to any deviation from the mandated regulations and procedures.

C. The Division Has Misconstrued the Grievance

Finally, it is clear from Mr. Andewelts' July 8, 1986 memorandum that the Antitrust Division misunderstands the central issue of the Grievance. The grievance focuses on the vulnerability of an employee who reports the criminal misconduct of his supervisors. It is the fact of the reporting that raises the need for a protective transfer. This is because even a well-intentioned supervisor necessarily loses objectivity and impartiality toward the employee by the fact of the reporting, itself.

JA 281

VI

MR. HILS HAS MISCHARACTERIZED THE CONVERSATIONS HE CITES

Even if believed, and even if taken cumulatively, the complaints in Mr. Hils; letters are so trivial in nature that they do not justify the extreme action of firing. In fact, Mr. Hils' allegations are even inconsistent with each other. His decision to offer such a serious recommendation based on such obviously insignificant and inconsistent grounds raise serious questions about his intent.

Clearly, my performance is not in issue. Mr. Hils proffers not a single complaint about any of my work I have performed. In fact, during my entire two years with the Great Lakes Office, Mr. Hils has never criticized any of my work, including work he reviewed during a trial.8/

8/ Because Mr. Weedon rated me Excellent for Conduct of Litigation, I assume Mr. Hils gave him favorable reports about my work on that trial.

JA 282

Mr. Hils' own conduct proves that my performance is not in issue, because he continued to delegate important work to me even after his June 25, 1986 letter. For example, on July 1, 1986, he assigned me to write the MATERIAL DELETED BY
BY THE GOVERNMENT for grand jury authority. In addition to what is normally required to prepare a request for grand jury authority, this assignment requires a review and analysis of 123 pages of FTC memoranda, as well as examination of numerous exhibits. Mr. Hils, the lead attorney, was originally assigned to prepare the grand jury request. After two weeks with it, he curiously decided to assign it to me, the third attorney.

The tactic Mr.Hils employs is simple. He realized he could not prevail by criticizing my work, because me work product speaks for itself and provides demonstrable proof that my performance has been excellent. Therefore, Mr. Hils chose instead to mischaracterize conversations, where there were no witnesses to prove what actually occurred.

Mr. Hils has presented a self-serving version of conversations by: deliberately omitting important segments of meetings; reporting statements out of context; and proffering his speculations on my thought processes. A scrutiny of the true and complete facts, however, demonstrate that Mr. Hils

has deliberately mischaracterized the three conversations he cites.

A. Assignment to Concrete Pipe Investigation

Mr. Hils labors to create the impression that my request not to work with him and (Delation made by the Government) on the concrete pipe investigation was unusual. Mr. Hils even tries to convert my reasonable request into an "incident," allegedly showing disrespect, insubordination, and harassing conduct so egregious as to justify removal.

Curiously, the person to whom I made the request and the person to whom I allegedly was disrespectful, Mr. Weedon, had never raised any objection to either the request or to my manner in presenting it. Mr. Weedon never complained to me during the June 16, 1986 meeting with him, or at any other time.

The truth is that such requests are not at all unusual and almost every attorney, at one time or another, has requested not to work with certain other persons. In fact, it is my understanding that I am at least the fifth attorney to ask not

PAGES 26 AND 27 WERE DELETED BY THE GOVERNMENT

In spite of all of these valid concerns, however,

Mr. Weedon refused to reassign me and chose to continue me on the concrete pipe staff. According to Mr. Hils, Mr. Weedon cleared this decision with Mr. Widmar.

Most importantly, I never, at any time, refused to work on the concrete pipe investigation. Mr. Hils' allegation is a total fabrication and another example of his willingness to present false statements about others. In fact, his own June 25, 1986 letter admits that I promptly performed every assignment given to me on the matter. Mr. Hils' allegations are inconsistent with each other, as well as with my conduct.

I did say that I did not want to be assigned to work with Mr. Hils or (DELETION MADE BY THE GOVERNMENT) and that I would appeal the decision to Mr. Widmar. A chief should be advised of potentials for friction. Mr. Hils errs by equating this with a refusal to accept the assignment.

Because Mr. Weedon had always granted similar requests from other attorneys in the past, and in view of the totality of the circumstances regarding Mr. Weedon, there is no question that Mr. Weedon was deliberately making a punitive assignment. Because I wanted to communicate to Mr. Weedon that I considered this a serious and important matter, I also said that I would add this assignment to my Grievance. I was making every effort to resolve the situation at the Cleveland level. Surely, these is nothing wrong with saying this, and Mr. Hils cannot now distort my motivation. Further proof that I was not just making threats can be found in the fact that I did include this issue in my Grievance, as I said I would.

Mr. Hils' attempt to characterize this discussion as an "incident" is a transparent attempt to manufacture fault with me; when, in fact, he and Mr. Weedon were the ones being

unreasonable and over-bearing. Mr. Weedon and Mr. Hils were the ones intentionally setting up a scenario that they hoped would result in an incident. (The fact that, in the past, Mr. Hils and (DELETION MADE BY THE GOVERNMENT) See Part VI, A, above. Second, Mr. Hils attempts to punish me for filing my Grievance.

JA 284

It is an absurd distortion for Mr. Hils to claim that the purpose behind my mentioning my Grievance was to intimidate him and Mr. Weedon; when, in fact, it is Mr. Weedon and Mr. Hils who are attempting to intimidate and stifle any remarks or opinions they dislike. For example, Mr. Weedon used the word insubordinate only twice in his May 21, 1986 90-day notice. In both instances, the conduct he alleges was insubordinate was my saying that he has committed a crime.

Mr. Hils objects to the fact that I told him he would be violating 18 U.S.C. s4, if he conducted the weekly meetings. The fact is that Mr. Weedon established the weekly meetings to punish me for reporting his ongoing obstruction of justice in the Press/Plain Dealer grand jury investigation.

All of Mr. Weedon's unjust criticisms of my work and the work of (DELETION MADE BY THE GOVERNMENT) are actually his attempts to discredit us in order to cover up the obstruction of justice. The appeal records cited in my Grievance repeatedly expose this tactic.

In an effort to cover up the obstruction, Mr. Weedon and Mr. Hils even went to the empaneling judge and tried to discredit us. The 90-day notice and the weekly meetings are merely additional attempts to denigrate my work and justify

Mr. Weedon's improper handling of the investigation. Therefore,
the weekly meetings are designed to cover up the obstruction of justice and do indeed constitute violations of
18 U.S.C. s4.

If I had not mentioned my Grievance or my belief that Mr. Hils was violating the law and engaging in prohibited personnel practices, I could later be criticized for not raising these issues. It is unjust for Mr. Hils to now recommend that I be fired, because these serious and improper issues worry him.

Furthermore, Mr. Hils' allegations concerning my draft of sections of the electrical memorandum are an obvious game of semantics. I never, at any time, refused to provide him with my draft. Mr. Hils is intentionally confusing secretarial typing with attorney drafts.

Mr. Hils admits that the draft numbers are placed on the documents by the secretaries, not the attorneys. As he knows, these numbers are secretarial codes for retrieving a matter being worked on, rather than any indication of whether an item is a separate attorney draft. Mr. Hils even admits that these secretarial codes indicate work "returned for re-typing in the word processing pool."

JA 285

Mr. Hils alleges that, by June 20, 1986, I had produced five drafts of my sections of the electrical memorandum; when actually, I had been working on only one draft. The five "drafts" he cites in his letter were indeed merely work on the same draft returned for retyping, rather than separate attorney

drafts.

Mr. Hils is aware of this distinction between this method of secretarial coding and actual attorney drafts. For example, it is the practice in our Office for the secretary to automatically advance the designated draft number each time the
draft is retyped. If an attorney prepares a draft and it is retyped solely to correct typographical errors, the secretary still labels it "Draft #2". when it is corrected; even though the attorney made no changes whatsoever, and it is clearly not a second attorney draft. Under Mr. Hils' theory, these would be two separate drafts and I should provide him with both, even though they are identical, except for typographical errors.

Mr. Hils admits that, during the June 20, 1986 meeting, I informed him that I had written sections of the electrical memorandum, but that I was still working on my draft. I never concealed any drafts from Mr. Hils, as he tries to imply. Mr. Hils' own letter shows that, after I reported on the status of my draft, he did not ask for a copy and he was satisfied to wait until I had completed my work on the draft. Later in the day, as soon as he asked for the draft, I provided it to him.

If his request for drafts is truly intended to improve my performance, then "draft" must mean work that I consider ready for review. There can be no legitimate purpose for asking for my work before I have even finished it.12/ This what I understand to be a "finished draft"- - namely a product ready for review. Mr. Hils again plays games in semantics by confusing a "finished draft" with a "final"/

Moreover, Mr. Hils did not keep repeating his questions six

times in order to "set [my]ming at ease." Rather, he was definitely badgering me and requiring that I repeat my answers in order to harass me. Furthermore, I am not required to try to provide Mr. Hils with an "appropriate context" for harassing and abusing me. There never is an appropriate context for such conduct in a supervisor.

12/ On a past occasion, Mr. Weedon prematurely collect my unfinished drafts on subpoenas and then later on my appraisal appeal criticized them as though they were submitted to be finals.

JA 286

C.July 3, 1986 Meeting

Mr. Hils' July 8, 1986 letter shows the petty and contrived nature of his allegations. The contrived character of the letter is obvious when it is analyzed. For example, Mr. Hils claims that I "carefully planned and calculated: to place him in the dilemma that he would be in trouble if he conducted the July 3, 1986 meeting and he would be in trouble if he did not conduct the meeting. He contends that I should be fired for deliberately "maneuvering" him into this dilemma.

First, it was clear from the fact that Mr. Hils held the June 20, 1986 and July 3, 1986 meetings that he had decided for himself that it was not improper to do so. Thus, he felt no dilemma by holding the July 3, 1986 meeting.

Second, I had absolutely no way of knowing in advance that Mr. Hils would conclude the meeting. On the contrary, it is obvious that I could not have known ahead that he would conclude the meeting. Therefore, I could not possibly have carefully calculated and planned ahead to place him in a

dilemma.

He placed himself in the dilemma when he decided not to continue the meeting. That was his decision and his action, not mine. It is clearly unfair for Mr. Hils to now attempt to fire me because he decided to conclude the meeting.

In fact, Mr. Hils' conduct reveals that it was he, not I who carefully designed and calculated the course of the July 3, 1986 meeting. Mr. Hils, in his June 25, 1986 letter, had already secretly recommended my removal. Yet, he engaged in the charade of having the July 3 meeting allegedly to help me with my performance. His behavior at the meeting, however, refutes his allegation that he wanted to improve my work.

For example, Mr. Hils deliberately omits any mention of an important segment of the meeting. At the beginning of the meeting, I gave Mr. Hils my July 2, 1986 draft of my sections of the electrical memorandum. I requested the opportunity to discuss this draft with Mr. Hils in the context of the entire memorandum. Mr. Hils refused to get the other sections of the draft to review my draft along with them.

By that time Mr. Hils had had my previous draft for two weeks and still had not discussed it with me; nor had he offered even a single comment about it, or about any of my work.

JA 287

I then asked Mr. Hils how he proposed to use my drafts he was collecting to make suggestions for improvement, if he did not intend to review the drafts with me. Mr. Hils had no

answer. 13/ After not answering, Mr. Hils then abruptly stated that he was concluding the meeting because he felt I was being confrontational.

This refusal by Mr. Hils to discuss my work and his abrupt termination of the meeting persuasively show that Mr. Hils was the one who had decided in advance to conclude the meeting at the earliest possible moment. His conduct, rather than his allegations, reveals the true purpose and intent of the meetings.

VII

CONCLUSION

Mr. Hils' letters and recommendations actually prove the central issue of the Grievance - - an employee who has reported the criminal misconduct of some of his supervisors should not be assigned to continue to report to those same supervisors. Because of their obvious conflicts of interests, and their inability to be fair and objective, persons I have reported to the Office of Professional Responsibility ("OPR"), or who are implicated by the evidence before the OPR, should not be permitted to make any adverse personnel decisions affecting me. Mr. Hils is one of these persons.

A review of my Grievance and Mr. Hils' letters shows that it is not possible to separate them. Indeed, they are so integrated that a ruling on one necessarily decides the other. Therefore, I request that Mr. Hils' letters, the transcript of the July 9, 1986 meeting, and this response memorandum be forwarded to Labor-Management Relations for inclusion in the file on my June 23, 1986 Grievance.

13/ Even by the time of the July 9, 1986 meeting in Washington, Mr. Hils' continued silence on this question shows that he has given no thought whatsoever, during the last two months, as to how he would carry out the alleged purpose of the weekly meetings.

The June 25 and July 8, 1986 letters from David F. Hils to Douglas H. Ginsburg are obviously a response to my June 23, 1986 Grievance. The retaliatory intent behind these letters is clear. First, Mr. Hils is engaging in retaliation for my filing a Grievance and for my making some of his improper conduct toward employees in the Great Lakes Office an issue of the Grievance. Second, and even more significant, he is

retaliating against me for reporting his participation in the conspiracy to obstruct the Press/Plain Dealer grand jury investigation and his participation in the efforts to cover-up the investigation.

Finally, he is retaliating against me for being one of (MATERIAL DELETED BY THE GOVERNMENT) representatives and witnesses in (MATERIAL DELETED BY THE GOVERNMENT) grievance hearing on (MATERIAL DELETED BY THE GOVERNMENT) 1986. Mr. Hils was (MATERIAL DELETED BY THE GOVERNMENT) representative and, thus, held the position comparable to mine for the opposite side.

Mr. Hils, a supervisor I have reported, has requested that I be fired. Thus, his conduct is not only the subject matter of the Grievance; it is exactly the abuse the Grievance seeks

to prevent. Mr. Hils, through his letters, has proven the legitimacy and importance of the relief sought by the Grievance and has confirmed the necessity for providing the relief expeditiously.

The mandated regulations of the Department of Justice for handling grievances must be followed before any decision is reached.

Therefore, I must respectfully object to: (1) the appointment of Roger Andewelt as the decision-maker on the Grievance; (2) the attempt to substitute the OPR investigation for grievance fact-finding; and (3(the manner in which the Division has construed the Grievance.

Mr. Weedon's May 21, 1986 90-day notice provided no notice that he or Mr. Hils considered any of my conduct harassing or disrespectful. This is obvious from the very fact that the words "harassing" and "disrespectful" are not even used in the 90-day notice.

Mr. Hils has presented a self-serving version of conversations by: deliberately omitting important segments of meetings; reporting statements out of context; and proffering his speculations on my thought processes. A scrutiny of the true and complete facts, however, demonstrates that Mr. Hils has deliberately mischaracterized the three conversations he cites.

Mr. Hils labors to create the impression that my request not to work with him and (MATERIAL DELETED BY THE GOVERNMENT) concrete pipe investigation was unusual. Mr. Hils even tries to convert my reasonable request into an "incident," allegedly showing disrespect, insubordination, and

harassing conduct so egregious as to justify my immediate removal. The truth is that such requests are not at all unusual in the Great Lakes Office. It is my understanding that I am at least the fifth attorney to as not to work with (MATERIAL DELETED BY THE GOVERNMENT).

Most significantly, I never refused to work on the concrete pipe investigation and I began to do so.

JA 289

Because these were new investigation, Mr. Weedon was just starting to make the staffing assignments for them. It was, therefore, an appropriate time to make my request, if any redistribution was to be done without causing disruption. My request was a reasonable one.

Numerous documents in my appeal records and those (MATERIAL DELETED BY THE GOVERNMENT) and (MATERIAL DELETED BY THE GOVERNMENT) prove unequivocally that Mr. Hils, (MATERIAL DELETED BY THE GOVERNMENT) and Mr. Weedon have made false statements and manufactured unjust complaints about several employees. These documents were further corroborated by the sworn testimony of witnesses at the (MATERIAL DELETED BY THE GOVERNMENT), 1986 hearing on (MATERIAL DELETED BY THE GOVERNMENT) grievance. Because Mr. Weedon is familiar with these appeal records, there was no need for me to elaborate further during the June 16, 1986 meeting.

Mr. Hils' July 8, 1986 letter shows the petty and contrived nature of his allegations. For example, I had absolutely no way of knowing in advance that Mr. Hils would conclude the meetings. On the contrary, it is obvious that I could not

have known ahead that he would conclude the meeting. Therefore, I could not possibly have calculated and planned ahead to place him in a dilemma. This is a clear example of Mr. Hils trying to manufacture fault rather than to fairly and accurately report a conversation.

I deny that I have ever been disrespectful or insubordinate. The truth is that Mr. Weedon and Mr. Hils are the ones attempting to harass and intimidate me.

Because of their obvious conflict of interests, and their inability to be fair and objective, persons I have reported to the OPR, or who are implicated by the evidence before the OPR, should not be permitted to make any adverse personnel decisions affecting me. Mr. Hils is one of these persons.

Finally, for the reasons stated in the Grievance, I cannot be expected to continue to report to Mr. Weedon and Mr. Hils. Even Mr. Hils agrees in his letters that such a situation is intolerable. Therefore, it seems most appropriate that, upon my August 18, 1986 return from annual leave, I be detailed to the United States Attorney's Office, either in Washington, D.C. or in Cleveland, Ohio, until resolution of the Grievance and completion of the OPR investigation.
Enclosure

JA 290.

cc: Weedon, Bobula, Keane, Hils, Porter,
Diller, Kent Brown (Chicago Field Office),
Marilyn J. Simon (ELS, Rm. 7219),
Mary Schaffer, (ELS, Rm. 7332 Main), Cleve, Chron, Log

G-129

Subject: Cleveland Plain Dealer Acquisition
of Assets of Cleveland Press

Date: August 12, 1986

File: 60-127-46

To: The Files From: John A. Weedon
Great Lakes Office

REPORT OF INTERVIEW

WITH: George R. Simmons

Special Agent, U.S. Department of Defense
Defense Criminal Investigative Service
Room 1441
1240 East Ninth Street
Cleveland, Ohio 44199

ON: July 22, 1986

BY: John A. Weedon
Michael J. Keane

We interviewed Simmons to learn more information about the comment that he made to Binder, Brown, and Rosner in September of 1985. Simmons said that a confidential informant had told him that Presser was given $30,000 in cash to make sure that the Teamster's Union did not cause a problem. The payment occurred within a matter of days before Cole's

purchase of the Press IN 1980. The monies were paid so that the concessions which Cole wanted would be granted. According to the informant, Cole and Presser met, the money was given to Presser in a briefcase, and Presser gave the money to a third person who then took the money along with other monies to the the Caymens or the Bahamas. Simons apparently knew where the transfer of money occurred, but would not say because it would reveal the identity of the informant.

Simmons also said that when the Press closed, he understood that Presser had a conversation with Parisi to insure that no action against the Plain Dealer would be taken in support of Press employees. There was a fear that the drivers of the Plain Dealer might do something to assist the drivers of the Press.

JA 291

Simmons said that he would contact the confidential informant to see if he would talk to us. Simmons considered the informant to be an excellent and truthful source. Simmons said he would call by the end of next week and tell us whether the informant would visit with us. If we do not get a call, he asked us to call him.

Simmons said that Cole and Presser go back a long way, and that some of their prior activities were very questionable. Simmons said that there is no active investigation that he is aware of in regard tot he above payments. Simmons had no otherinformation in regard to payments made by Cole in relationto the Press or Plain Dealer matters. He said that the informant had no reason to be aware of any other payments. He did say that the rumor was that Cole made a payment to Presser

by giving an ownership share of North Point to the Climaco law firm which represents Presser.

JA 298

cc: Shaheen, Bobzien, Widmar, Bobula

Subject: Cleveland Plain Dealer Acquisition of Assets of Cleveland Press; Request to Finalize Memoranda

To: Michael E. Shaheen, Jr., Counsel
Office of Professional Responsibility

and

Joseph H. Widmar, Director
Office of Operations, Antitrust Division

The enclosed draft of my memorandum recommending against immunizing (redacted) and (redacted) was completed and ready to be typed in final on Thursday, August 21, 1986. John Weedon refused to let it be finalized, refused to forward it to Washington, and refused to let me circulate it to the rest of the staff, even in draft.

The other staff attorneys, the Office of Operations, and anyone else considering immunity for these two targets are entitled to receive uncensored memorandum prior to making their decisions. Similarly, I am entitled to have my views recorded and maintained in the Washington and Cleveland Press/Plain Dealer file and the OPR file.

I respectfully request that I be permitted to finalize my memorandum and that a copy of it be forwarded to Patrick M. McLaughlin, United States Attorney for the Northern District

of Ohio.
Enclosures.

JA 300

U.S. Department of Justice
Washington, D.C. 20530

Apr 14 1987

C. Russell Twist, Esq.
5047 Sedgwick Street, N.W.
Washington, D.C. 20016

Dear Mr. Twist:

I am writing to inform you that the Office of Professional Responsibility (OPR) of the Department of Justice has completed its investigation of your charges against John A. Weedon, your former supervisor in the Divisions's Great Lakes office. OPR's investigation determined that in each instance of alleged misconduct, the actions and decisions cited by you and Ms. Bobula as indicative of obstruction of the grand jury investigation constituted appropriate exercises of prosecutorial discretion intended by your supervisors in Cleveland and Washington only to advance the case. Moreover, OPR found that at times the actions and decisions of those officials were made in an effort to cure case-related deficiencies attributable to you and Ms. Bobula.

Based on its length and its consideration of every detail

of your allegations, the Antitrust Division is satisfied that the investigation was conducted in a forthright and fair manner and that the decision is correct.

Sincerely,

Ralph J. Justice
Executive Officer
Antitrust Division

JA 301

The New York Times, Wednesday, June 17, 1987

Inquiry on Cleveland Paper Ends Without Charges
By Alex S. Jones

The Justice Department said yesterday that a grand jury investigation into whether antitrust law was violated in the closing of the Cleveland Press in 1982 has been concluded with no charges filed.

The investigation, which lasted nearly three years, centered on whether Samuel I. Newhouse Jr., owner of the rival Cleveland Plain Dealer, had paid the owner of The Cleveland Press to go out of business, which would have violated antitrust law.

Joseph E. Cole, owner of The Press, and Mr. Newhouse have said that Mr. Cole decided to close his money-losing newspaper before Mr. Newhouse offered to pay $22.5 million for The Press's circulation list and a subsidiary bulk-mailing company.

The Justice Department began its investigation after the Akron Beacon Journal reported in 1984 that the value of these assets was far less than $22.5 million. The Beacon Journal said Mr. Newhouse agreed to the price on the condition that Mr. Cole would close the Press and dismantle it, assuring The Plain Dealer a monopoly in cleveland.

Mr. Newhouse and Mr. Cole denied that such an agreement ever existed and said that the money Mr. Newhouse paid was justified.

The antitrust division of the Justice Department did not find enough evidence to continue the investigation, according to a spokesman, Mark T. Sheehan. He added that the Press ceased publication in June 17, 1982, and that the five year statute of limitations was about to expire.

When Mr. Cole bought The Press in 1980, he declared that the newspaper was to be reborn after a history of chronic financial trouble. Despite considerable investment and effort, the Press was losing about $1 million by the spring of 1982.

That spring, Mr. Cole met several times with Mr. Newhouse, whose family holdings include a group of newspapers and magazines
such as The New Yorker and the Conde Nast group, to discuss the situation.

Building Is Torn Down

But both men said they were well aware that antitrust law

prohibited Mr. Newhouse from discussing what he might pay for
The Press's assets if the paper were to be sold. They said negotiations between the two began only after Mr. Cole told Mr. Newhouse he had decided to cease publication.

Soon after The Press closed, Mr. Cole sold the newspaper's presses and other equipment that, theoretically, could have been used by a buyer who wished to keep the newspaper alive. Mr. Cole also tore down the building.

In August 1986, Russell Twist, a Justice Department lawyer who took part in the investigation, left the department and soon afterward filed a civil suit charging that he was forced to leave after criticizing his superiors for not aggressively pursuing the investigation.

Mr. Sheehan declined to comment on the circumstances under which Mr. Twist departed, but he said the department's Office of Professional Responsibility had investigated Mr. Twist's assertions and found them without merit.

Court Order Is Appealed

In November, the United States Court of Appeals for the Sixth Circuit heard an appeal of a district court order that documents prepared by lawyers and involving Mr. Newhouse
and Mr. Cole be made available to the grand jury as part of the investigation.

The appeals court said the material culled from testimony before the grand jury by the Justice Department "viewed alone

does present a reasonable basis for suspecting that a crime was committed."

Mr. Sheehan noted that the Court of Appeals was not shown the complete testimony that the grand jury had heard.

The appeals court reversed the district court order that the documents had to be made available. But the documents were
later provided to the grand jury voluntarily, according to William E. Willis, a lawyer for Mr. Newhouse.